



## **DEPARTMENT OF HOMELAND SECURITY**

### **8 CFR Parts 214 and 274a**

**[CIS No. 2708-21]**

**RIN 1615-AC77**

## **DEPARTMENT OF LABOR**

### **Employment and Training Administration**

### **20 CFR Part 655**

**[DOL Docket No. ETA-2022-0001]**

**RIN 1205-AC09**

### **Exercise of Time-Limited Authority to Increase the Fiscal Year 2022 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers**

**AGENCY:** U.S. Citizenship and Immigration Services (USCIS), Department of Homeland Security (DHS), and Employment and Training Administration and Wage and Hour Division, U.S. Department of Labor (DOL).

**ACTION:** Temporary rule.

**SUMMARY:** The Secretary of Homeland Security, in consultation with the Secretary of Labor, is exercising his time-limited Fiscal Year (FY) 2022 authority and increasing the total number of noncitizens who may receive an H-2B nonimmigrant visa by authorizing the issuance of no more than 20,000 additional visas during FY 2022 for positions with start dates on or before March 31, 2022, to those businesses that are suffering irreparable harm or will suffer impending irreparable harm, as attested by the employer on a new attestation form. In addition to making additional visas available under the FY 2022 time-limited authority, DHS is exercising its general H-2B regulatory authority to again provide temporary portability flexibility by allowing H-2B workers who are already in the United States to begin work immediately after an H-2B petition

(supported by a valid temporary labor certification) is received by USCIS, and before it is approved.

**DATES:** *Effective dates:* The amendments to title 8 of the Code of Federal Regulations in this rule are effective from [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] through January 28, 2025. The amendments to title 20 of the Code of Federal Regulations in this rule are effective from [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] through September 30, 2022, except for 20 CFR 655.69 which is effective from [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] through September 30, 2025.

*Petition dates:* DHS will not accept any H-2B petition under the provisions related to the supplemental numerical allocation after March 31, 2022, and the provisions related to portability are only available to petitioners and H-2B nonimmigrant workers initiating employment through the end of [INSERT DATE 180 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

*Comment dates:* The Office of Foreign Labor Certification within the U.S. Department of Labor will be accepting comments in connection with the new information collection Form ETA-9142B-CAA-5 associated with this rule until [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit written comments on the new information collection Form ETA-9142B-CAA-5, identified by Regulatory Information Number (RIN) 1205-AC09 electronically by the following method:

*Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions on the website for submitting comments.

*Instructions:* Include the agency's name and the RIN 1205-AC09 in your submission. All comments received will become a matter of public record and will be posted without change to

<https://www.regulations.gov>. Please do not include any personally identifiable information or confidential business information you do not want publicly disclosed.

**FOR FURTHER INFORMATION CONTACT:** Regarding 8 CFR parts 214 and 274a:

Charles L. Nimick, Chief, Business and Foreign Workers Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 5900 Capital Gateway Drive, Camp Springs, MD 20746; telephone 240-721-3000 (this is not a toll-free number).

Regarding 20 CFR part 655 and Form ETA-9142B-CAA-5: Brian D. Pasternak, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, Department of Labor, 200 Constitution Ave NW, Room N-5311, Washington, DC 20210, telephone (202) 693-8200 (this is not a toll-free number).

Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at 1-877-889-5627 (TTY/TDD).

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## **I. Executive Summary**

### *FY 2022 H-2B Supplemental Cap*

With this temporary final rule (TFR), the Secretary of Homeland Security, following consultation with the Secretary of Labor, is authorizing the immediate release of an additional 20,000 H-2B visas for FY 2022 positions with start dates on or before March 31, 2022, subject to certain conditions. The 20,000 visas are divided into two allocations, as follows:

- 13,500 visas limited to returning workers, regardless of country of nationality, in other words, those workers who were issued H-2B visas or held H-2B status in fiscal years 2019, 2020, or 2021; and
- 6,500 visas reserved for nationals of El Salvador, Guatemala, and Honduras (Northern Triangle countries) and Haiti as attested by the petitioner (regardless of whether such nationals are returning workers).

To qualify for the FY 2022 supplemental cap provided by this temporary final rule, eligible petitioners must:

- Meet all existing H-2B eligibility requirements, including obtaining an approved temporary labor certification (TLC) from DOL before filing the Form I-129, Petition for Nonimmigrant Worker, with USCIS;
- Properly file the Form I-129, Petition for Nonimmigrant Worker, with USCIS on or before March 31, 2022, requesting an employment start date on or before March 31, 2022;

- Submit an attestation affirming, under penalty of perjury, that the employer is suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all of the H-2B workers requested on the petition, and that they are seeking to employ returning workers only, unless the H-2B worker is a Salvadoran, Guatemalan, Honduran, or Haitian national and counted towards the 6,500 cap; and
- Agree to comply with all applicable labor and employment laws, including health and safety laws pertaining to COVID-19, as well as any rights to time off or paid time off to stay up-to-date with COVID-19 vaccinations,<sup>1</sup> or to reimbursement for travel to and from the nearest available vaccination site, and notify the workers in a language understood by the worker as necessary or reasonable, of equal access of nonimmigrants to COVID-19 vaccines and vaccination distribution sites.

Employers filing an H-2B petition 45 or more days after the certified start date on the TLC, must attest to engaging in the following additional steps to recruit U.S. workers:

- No later than 1 business day after filing the petition, place a new job order with the relevant State Workforce Agency (SWA) for at least 15 calendar days;
- Contact the nearest American Job Center serving the geographic area where work will commence and request staff assistance in recruiting qualified U.S. workers;
- Contact the employer's former U.S. workers, including those the employer furloughed or laid off beginning on January 1, 2020, and until the date the H-2B petition is filed, disclose the terms of the job order and solicit their return to the job;
- Provide written notification of the job opportunity to the bargaining representative for the employer's employees in the occupation and area of employment, or post notice of the job opportunity at the anticipated worksite if there is no bargaining representative; and

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<sup>1</sup> The term "COVID-19 vaccinations" also includes COVID-19 booster shots.

- Hire any qualified U.S. worker who applies or is referred for the job opportunity until the later of either (1) the date on which the last H-2B worker departs for the place of employment, or (2) 30 days after the last date of the SWA job order posting.

Petitioners filing H-2B petitions under this FY 2022 supplemental cap must retain documentation of compliance with the attestation requirements for 3 years from the date the TLC was approved, and must provide the documents and records upon the request of DHS or DOL, as well as fully cooperate with any compliance reviews such as audits. Both DHS and DOL intend to conduct a significant number of post-adjudication audits to ascertain compliance with the attestation requirements of this TFR.

Falsifying information in attestation(s) can result not only in penalties relating to perjury, but can also result in, among other things, a finding of fraud or willful misrepresentation; denial or revocation of the H-2B petition requesting supplemental workers; and debarment by DOL and DHS from the H-2 program. Falsifying information also may subject a petitioner/employer to other criminal penalties.

DHS will not approve H-2B petitions filed in connection with the FY 2022 supplemental cap authority on or after October 1, 2022, but DHS does not anticipate that petitions filed in connection with this rule will remain pending until the end of FY 2022, given the March 31, 2022 filing deadline.

#### *H-2B Portability*

In addition to exercising time-limited authority to make additional FY 2022 H-2B visas available for positions with start dates on or before March 31, 2022, DHS is providing additional flexibilities to H-2B petitioners under its general programmatic authority by allowing nonimmigrant workers in the United States<sup>2</sup> in valid H-2B status and who are beneficiaries of

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<sup>2</sup> The term “United States” includes the continental United States, Alaska, Hawaii, Puerto Rico, Guam, the Virgin Islands of the United States, and the Commonwealth of the Northern Mariana Islands. INA section 101(a)(38), 8 U.S.C. 1101(a)(38).

non-frivolous H-2B petitions received on or after [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], or who are the beneficiaries of non-frivolous H-2B petitions that are pending as of [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], to begin work with a new employer after an H-2B petition (supported by a valid TLC) is filed and before the petition is approved, generally for a period of up to 60 days. However, such employment authorization would end 15 days after USCIS denies the H-2B petition or such petition is withdrawn. This H-2B portability ends 180 days after the effective date of this rule, in other words, after the date this rule is published in the *Federal Register*. This provision clarifies portability eligibility for beneficiaries of pending petitions.

## **II. Background**

### **A. Legal Framework**

The Immigration and Nationality Act (INA), as amended, establishes the H-2B nonimmigrant classification for a nonagricultural temporary worker “having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform . . . temporary [non-agricultural] service or labor if unemployed persons capable of performing such service or labor cannot be found in this country.” INA section 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b). Employers must petition the Department of Homeland Security (DHS) for classification of prospective temporary workers as H-2B nonimmigrants. INA section 214(c)(1), 8 U.S.C. 1184(c)(1). Generally, DHS must approve this petition before the beneficiary can be considered eligible for an H-2B visa. In addition, the INA requires that “[t]he question of importing any alien as [an H-2B] nonimmigrant . . . in any specific case or specific cases shall be determined by [DHS],<sup>3</sup> after consultation with appropriate

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<sup>3</sup> As of March 1, 2003, in accordance with section 1517 of Title XV of the Homeland Security Act of 2002 (HSA), Public Law 107-296, 116 Stat. 2135, any reference to the Attorney General in a provision of the Immigration and Nationality Act describing functions which were transferred from the Attorney General or other Department of Justice official to the Department of Homeland Security by the HSA “shall be deemed to refer to the Secretary” of Homeland Security. See 6 U.S.C. 557 (2003) (codifying HSA, Title XV, sec. 1517); 6 U.S.C. 542 note; 8 U.S.C. 1551 note.

agencies of the Government.” INA section 214(c)(1), 8 U.S.C. 1184(c)(1). The INA generally charges the Secretary of Homeland Security with the administration and enforcement of the immigration laws, and provides that the Secretary “shall establish such regulations . . . and perform such other acts as he deems necessary for carrying out his authority” under the INA. *See* INA section 103(a)(1), (3), 8 U.S.C. 1103(a)(1), (3); *see also* 6 U.S.C. 202(4) (charging the Secretary with “[e]stablishing and administering rules . . . governing the granting of visas or other forms of permission . . . to enter the United States to individuals who are not a citizen or an alien lawfully admitted for permanent residence in the United States”). With respect to nonimmigrants in particular, the INA provides that “[t]he admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the [Secretary] may by regulations prescribe.” INA section 214(a)(1), 8 U.S.C. 1184(a)(1); *see also* INA section 274A(a)(1) and (h)(3), 8 U.S.C. 1324a(a)(1) and (h)(3) (prohibiting employment of noncitizen<sup>4</sup> not authorized for employment). The Secretary may designate officers or employees to take and consider evidence concerning any matter which is material or relevant to the enforcement of the INA. INA sections 287(a)(1), (b), 8 U.S.C. 1357(a)(1), (b) and INA section 235(d)(3), 8 U.S.C. 1225(d)(3).

Finally, under section 101 of HSA, 6 U.S.C. 111(b)(1)(F), a primary mission of DHS is to “ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland.”

DHS regulations provide that an H-2B petition for temporary employment in the United States must be accompanied by an approved TLC from the U.S. Department of Labor (DOL), issued pursuant to regulations established at 20 CFR part 655, or from the Guam Department of Labor if the workers will be employed on Guam. 8 CFR 214.2(h)(6)(iii)(A) and (C) through (E), (h)(6)(iv)(A); *see also* INA section 103(a)(6), 8 U.S.C. 1103(a)(6). The TLC serves as DHS’s

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<sup>4</sup> For purposes of this discussion, the Departments use the term “noncitizen” colloquially to be synonymous with the term “alien” as it is used in the Immigration and Nationality Act.



consultation with DOL with respect to whether a qualified U.S. worker is available to fill the petitioning H-2B employer's job opportunity and whether a foreign worker's employment in the job opportunity will adversely affect the wages and working conditions of similarly-employed U.S. workers. *See* INA section 214(c)(1), 8 U.S.C. 1184(c)(1); 8 CFR 214.2(h)(6)(iii)(A) and (D).

In order to determine whether to issue a TLC, the Departments have established regulatory procedures under which DOL certifies whether a qualified U.S. worker is available to fill the job opportunity described in the employer's petition for a temporary nonagricultural worker, and whether a foreign worker's employment in the job opportunity will adversely affect the wages or working conditions of similarly employed U.S. workers. *See* 20 CFR part 655, subpart A. The regulations establish the process by which employers obtain a TLC and rights and obligations of workers and employers.

Once the petition is approved, under the INA and current DHS regulations, H-2B workers do not have employment authorization outside of the validity period listed on the approved petition unless otherwise authorized, and the workers are limited to employment with the H-2B petitioner. *See* 8 U.S.C. 1184(c)(1), 8 CFR 274a.12(b)(9). An employer or U.S. agent generally may submit a new H-2B petition, with a new, approved TLC, to USCIS to request an extension of H-2B nonimmigrant status for the validity of the TLC or for a period of up to 1 year. 8 CFR 214.2(h)(15)(ii)(C). Except as provided for in this rule, and except for certain professional athletes being traded among organizations,<sup>5</sup> H-2B workers seeking to extend their status with a new employer may not begin employment with the new employer until the new H-2B petition is approved.

The INA also authorizes DHS to impose appropriate remedies against an employer for a substantial failure to meet the terms and conditions of employing an H-2B nonimmigrant worker, or for a willful misrepresentation of a material fact in a petition for an H-2B nonimmigrant

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<sup>5</sup> *See* 8 CFR 214.2(h)(6)(vii) and 8 CFR 274a.12(b)(9).

worker. INA section 214(c)(14)(A), 8 U.S.C. 1184(c)(14)(A). The INA expressly authorizes DHS to delegate certain enforcement authority to DOL. INA section 214(c)(14)(B), 8 U.S.C. 1184(c)(14)(B); *see also* INA section 103(a)(6), 8 U.S.C. 1103(a)(6). DHS has delegated its authority under INA section 214(c)(14)(A)(i), 8 U.S.C. 1184(c)(14)(A)(i) to DOL. *See* DHS, Delegation of Authority to DOL under Section 214(c)(14)(A) of the INA (Jan. 16, 2009); *see also* 8 CFR 214.2(h)(6)(ix) (stating that DOL may investigate employers to enforce compliance with the conditions of an H-2B petition and a DOL-approved TLC). This enforcement authority has been delegated within DOL to the Wage and Hour Division (WHD), and is governed by regulations at 29 CFR part 503.

## **B. H-2B Numerical Limitations Under the INA**

The INA sets the annual number of noncitizens who may be issued H-2B visas or otherwise provided H-2B nonimmigrant status to perform temporary nonagricultural work at 66,000, to be distributed semi-annually beginning in October and April. *See* INA sections 214(g)(1)(B) and (g)(10), 8 U.S.C. 1184(g)(1)(B) and (g)(10). With certain exceptions, described below, up to 33,000 noncitizens may be issued H-2B visas or provided H-2B nonimmigrant status in the first half of a fiscal year, and the remaining annual allocation, including any unused nonimmigrant H-2B visas from the first half of a fiscal year, will be available for employers seeking to hire H-2B workers during the second half of the fiscal year.<sup>6</sup> If insufficient petitions are approved to use all H-2B numbers in a given fiscal year, the unused numbers cannot be carried over for petition approvals for employment start dates beginning on or after the start of the next fiscal year.

In FYs 2005, 2006, 2007, and 2016, Congress exempted H-2B workers identified as returning workers from the annual H-2B cap of 66,000.<sup>7</sup> A returning worker is defined by statute

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<sup>6</sup> The Federal Government's fiscal year runs from October 1 of the prior year through September 30 of the year being described. For example, fiscal year 2022 is from October 1, 2021, through September 30, 2022.

<sup>7</sup> INA section 214(g)(9)(A), 8 U.S.C. 1184(g)(9)(A), *see also* Consolidated Appropriations Act, 2016, Public Law 114-113, div. F, tit. V, sec 565; John Warner National Defense Authorization Act for Fiscal Year 2007, Public Law 109-364, div. A, tit. X, sec. 1074, (2006); Save Our Small and Seasonal Businesses Act of 2005, Public Law 109-13, div. B, tit. IV, sec. 402.

as an H-2B worker who was previously counted against the annual H-2B cap during a designated period of time. For example, Congress designated that returning workers for FY 2016 needed to have been counted against the cap during FY 2013, 2014, or 2015.<sup>8</sup> DHS and the Department of State (DOS) worked together to confirm that all workers requested under the returning worker provision in fact were eligible for exemption from the annual cap (in other words, were issued an H-2B visa or provided H-2B status during one of the prior 3 fiscal years) and were otherwise eligible for H-2B classification.

Because of the strong demand for H-2B visas in recent years, the statutorily-limited semi-annual visa allocation, the DOL regulatory requirement that employers apply for a TLC 75 to 90 days before the start date of work,<sup>9</sup> and the DHS regulatory requirement that all H-2B petitions be accompanied by an approved TLC,<sup>10</sup> employers that wish to obtain visas for their workers under the semi-annual allotment must act early to receive a TLC and file a petition with U.S. Citizenship and Immigration Services (USCIS). As a result, the date on which USCIS has received sufficient H-2B petitions to reach the first half of the fiscal year statutory cap has been trending earlier in recent years.<sup>11</sup> As of December 1, 2021, DOL's Office of Foreign Labor Certification (OFLC) reports having certified TLC applications for 65,717 H-2B workers with expected start dates between October 1, 2021, and March 1, 2022.<sup>12</sup> In addition, for fiscal year 2022, for the first time in more than a decade, USCIS received sufficient H-2B petitions to reach the first half of the fiscal year statutory cap before the start of the fiscal year – this year the last receipt date for the first half of the fiscal year was September 30, 2021, and last year it was

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<sup>8</sup> See Consolidated Appropriations Act, 2016, Public Law 114-113, div. F, tit. V, sec 565.

<sup>9</sup> 20 CFR 655.15(b).

<sup>10</sup> See 8 CFR 214.2(h)(5)(i)(A).

<sup>11</sup> In fiscal years 2017 through 2021, USCIS received a sufficient number of H-2B petitions to reach or exceed the relevant first half statutory cap on January 10, 2017, December 15, 2017, December 6, 2018, November 15, 2019, and November 16, 2020, respectively. See <https://www.uscis.gov/archive/uscis-reaches-the-h-2b-cap-for-the-first-half-of-fiscal-year-2017> (Jan. 13, 2017); <https://www.uscis.gov/archive/uscis-reaches-h-2b-cap-for-first-half-of-fy-2018> (Dec. 21, 2017); <https://www.uscis.gov/news/news-releases/uscis-reaches-h-2b-cap-for-first-half-of-fy-2019> (Dec. 12, 2018); <https://www.uscis.gov/news/news-releases/uscis-reaches-h-2b-cap-for-first-half-of-fy-2020> (Nov. 20, 2019); <https://www.uscis.gov/news/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2021> (Nov. 18, 2020).

<sup>12</sup> Information provided by DOL OFLC via e-mail sent December 2, 2021.

November 16, 2020 – a month and a half earlier.<sup>13</sup> This early date continues to reflect an ongoing trend of higher H-2B demand in the first half of the fiscal year compared to the statutorily authorized level. Congress, in recognition of historical and current demand: (1) allowed for additional H-2B workers through the FY 2016 reauthorization of the returning worker cap exemption;<sup>14</sup> and (2) for the last 6 fiscal years authorized supplemental caps under section 543 of Division F of the Consolidated Appropriations Act, 2017, Public Law 115–31 (FY 2017 Omnibus); section 205 of Division M of the Consolidated Appropriations Act, 2018, Public Law 115–141 (FY 2018 Omnibus); section 105 of Division H of the Consolidated Appropriations Act, 2019, Public Law 116–6 (FY 2019 Omnibus); section 105 of Division I of the Further Consolidated Appropriations Act, 2020, Public Law 116–94 (FY 2020 Omnibus);<sup>15</sup> section 105 of Division O of the Consolidated Appropriations Act, 2021, Public Law 116–260 (FY 2021), and section 105 of Division O of the Consolidated Appropriations Act, 2021, Public Law 116–260 (FY 2021 Omnibus), and sections 101 and 106(3) of Division A of Public Law 117–43, Continuing Appropriations Act, 2022, and section 101 of Division A of Public Law 117–70, Further Continuing Appropriations Act, 2022 through February 18, 2022 (together, FY 2022 authority), which is discussed below.

### **C. FY 2021 Omnibus and FY 2022 Public Laws 117-43 and 117-70**

On December 27, 2020, then-President Donald Trump signed the FY 2021 Omnibus which contains a provision, section 105 of Division O (section 105), permitting the Secretary of Homeland Security, under certain circumstances and after consultation with the Secretary of Labor, to increase the number of H-2B visas available to U.S. employers, notwithstanding the

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<sup>13</sup> On October 12, 2021, USCIS announced that it had received sufficient petitions to reach the congressionally mandated cap on H-2B visas for temporary nonagricultural workers for the first half of fiscal year 2022, and that September 30, 2021 was the final receipt date for new cap-subject H-2B worker petitions requesting an employment start date before April 1, 2022. See <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2022> (Oct 12, 2021). November 16, 2020 was the last receipt date for the first half of FY 2020. See <https://www.uscis.gov/news/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2021> (Nov. 18, 2020).

<sup>14</sup> INA section 214(g)(9)(a), 8 U.S.C. 1184(g)(9)(a), as revised by the Consolidated Appropriations Act of 2016 (Pub. L. 114–113). This program expired on September 30, 2016.

<sup>15</sup> DHS, after consulting with DOL, did not publish a temporary final rule supplementing the H–2B cap for FY 2020 pursuant to the Further Consolidated Appropriations Act, 2020, Public Law 116–94.

otherwise-established statutory numerical limitation set forth in the INA. Specifically, section 105 provides that “the Secretary of Homeland Security, after consultation with the Secretary of Labor, and upon the determination that the needs of American businesses cannot be satisfied in [FY] 2021 with U.S. workers who are willing, qualified, and able to perform temporary nonagricultural labor,” may increase the total number of noncitizens who may receive an H-2B visa in FY 2021 by not more than the highest number of H-2B nonimmigrants who participated in the H-2B returning worker program in any fiscal year in which returning workers were exempt from the H-2B numerical limitation.<sup>16</sup> The Secretary of Homeland Security consulted with the Secretary of Labor and, on May 25, 2021, published a temporary final rule implementing the authority contained in section 105.<sup>17</sup>

On December 3, 2021, Congress passed Public Law 117-70,<sup>18</sup> which authorizes the Secretary of Homeland Security to increase the number of H-2B visas available to U.S. employers in FY 2022 under the same terms and conditions authorized in section 105 of Division O of the FY 2021 Omnibus. The authority in Public Law 117-70 permits the Secretary of Homeland Security, after consultation with the Secretary of Labor, to provide additional H-2B visas for FY 2022, notwithstanding the otherwise-established statutory numerical limitation set forth in the INA, for eligible employers whose employment needs for FY 2022 cannot be met under the general fiscal year statutory cap.<sup>19</sup> Under the Public Law 117-70 authority, DHS and

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<sup>16</sup> The highest number of returning workers in any such fiscal year was 64,716, which represents the number of beneficiaries covered by H-2B returning worker petitions that were approved for FY 2007. DHS also considered using an alternative approach, under which DHS measured the number of H-2B returning workers admitted at the ports of entry (66,792 for FY 2007).

<sup>17</sup> Temporary Rule, *Exercise of Time-Limited Authority To Increase the Fiscal Year 2021 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers*, 86 FR 28198 (May 25, 2021).

<sup>18</sup> Pub. L. 117-70 Further Extending Government Funding Act, Division A “Further Continuing Appropriations Act, 2022”, section 101 (Dec. 3, 2021) changing the Pub. L. 117-43 expiration date in section 106(3) from Dec. 3, 2021 to Feb. 18, 2022, and Pub. L. 117-43 Extending Government Funding and Delivering Emergency Assistance Act, Division A “Continuing Appropriations Act, 2022”, Section 101 and 106(3) (Oct. 3, 2021) providing DHS funding and authorities, including authority under section 105 of title I of Division O of Pub. L. 116-260, through December 3, 2021.

<sup>19</sup> Appropriations and authorities provided by the continuing resolutions are available for the needs of the entire fiscal year to which the continuing resolution applies, although DHS’s ability to obligate funds or exercise such authorities may lapse at the sunset of such resolution. *See, e.g.*, Comments on Due Date and Amount of District of Columbia’s Contributions to Special Employee Retirement Funds, B-271304 (Comp. Gen. Mar. 19, 1996)

DOL are jointly publishing this temporary final rule to authorize the issuance of no more than 20,000 additional visas during FY 2022 for positions with start dates on or before March 31, 2022, to those businesses that are suffering irreparable harm or will suffer impending irreparable harm, as attested by the employer on a new attestation form. The authority to approve H-2B petitions under this FY 2022 supplemental cap expires at the end of that fiscal year. Therefore, USCIS will not approve H-2B petitions filed in connection with the FY 2022 supplemental cap authority on or after October 1, 2022. Given the March 31, 2022 filing cutoff, USCIS will process H-2B petitions filed under this rule that request premium processing in line with the USCIS premium processing rules,<sup>20</sup> and all other H-2B petitions filed under this rule in the normal manner. Accordingly, DHS does not anticipate that petitions filed in connection with this rule will remain pending until the end of FY 2022.

As noted above, since FY 2017, Congress has enacted a series of public laws providing the Secretary of Homeland Security with the discretionary authority to increase the H-2B cap beyond that set forth in section 214 of the INA. The previous four statutory provisions were materially identical to section 105 of the FY 2021 Omnibus, which is the same authority provided for FY 2022 by the recent continuing resolutions. During each fiscal year from FY 2017 through FY 2019, the Secretary of Homeland Security, after consulting with the Secretary of Labor, determined that the needs of some American businesses could not be satisfied in such year with U.S. workers who were willing, qualified, and able to perform temporary nonagricultural labor. On the basis of these determinations, on July 19, 2017, and May 31, 2018,

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(explaining that “a continuing resolution appropriates the full annual amount regardless of its period of duration. . . . Standard continuing resolution language makes it clear that the appropriations are available to the extent and in the manner which would be provided by the pertinent appropriations act that has yet to be enacted (unless otherwise provided in the continuing resolution).”). Consistent with this principle, DHS interprets the current continuing resolution to provide DHS with the ability to authorize additional H-2B visa numbers with respect to all of FY 2022 subject to the same terms and conditions as the FY 2021 authority at any time before the continuing resolution expires, notwithstanding the reference to FY 2021 in the FY 2021 Omnibus.

<sup>20</sup> See 8 CFR 103.7(e) (Oct. 1, 2020). This section was amended by a DHS rule published in the *Federal Register* on August 3, 2020 at 85 FR 46788 titled *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements* with an effective date of October 2, 2021. That rule was preliminarily enjoined. DHS is complying with the terms of the preliminary injunctions and is not enforcing it. See *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements*; Notification of Preliminary Injunction, 86 FR 7493 (Jan. 18, 2021).

DHS and DOL jointly published temporary final rules for FY 2017 and FY 2018, respectively, each of which allowed an increase of up to 15,000 additional H-2B visas for those businesses that attested that if they did not receive all of the workers requested on the Petition for a Nonimmigrant Worker (Form I-129), they were likely to suffer irreparable harm, in other words, suffer a permanent and severe financial loss.<sup>21</sup> A total of 12,294 H-2B workers were approved for H-2B classification under petitions filed pursuant to the FY 2017 supplemental cap increase.<sup>22</sup> In FY 2018, USCIS received petitions for more than 15,000 beneficiaries during the first 5 business days of filing for the supplemental cap, and held a lottery on June 7, 2018. The total number of H-2B workers approved toward the FY 2018 supplemental cap increase was 15,788.<sup>23</sup> The vast majority of the H-2B petitions received under the FY 2017 and FY 2018 supplemental caps requested premium processing<sup>24</sup> and were adjudicated within 15 calendar days.

On May 8, 2019, DHS and DOL jointly published a temporary final rule authorizing an increase of up to 30,000 additional H-2B visas for the remainder of FY 2019. The additional visas were limited to returning workers who had been counted against the H-2B cap or were otherwise granted H-2B status in the previous 3 fiscal years, and for those businesses that attested to a level of need such that, if they did not receive all of the workers requested on the Form I-129, they were likely to suffer irreparable harm, in other words, suffer a permanent and severe financial loss.<sup>25</sup> The Secretary determined that limiting returning workers to those who

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<sup>21</sup> Temporary Rule, *Exercise of Time-Limited Authority To Increase the Fiscal Year 2017 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program*, 82 FR 32987, 32998 (July 19, 2017); Temporary Rule, *Exercise of Time-Limited Authority To Increase the Fiscal Year 2018 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program*, 83 FR 24905, 24917 (May 31, 2018).

<sup>22</sup> USCIS data pulled from the Computer Linked Application Information Management System (CLAIMS3) database on Mar. 15, 2021. General information about CLAIMS 3 is available at <https://www.dhs.gov/publication/dhsuscispia-016-computer-linked-application-information-management-system-claims-3-and>.

<sup>23</sup> The number of approved workers exceeded the number of additional visas authorized for FY 2018 to allow for the possibility that some approved workers would either not seek a visa or admission, would not be issued a visa, or would not be admitted to the United States. USCIS data pulled from CLAIMS3 on Mar. 15, 2021.

<sup>24</sup> Premium processing allows for expedited processing for an additional fee. See INA 286(u), 8 U.S.C. 1356(u).

<sup>25</sup> Temporary Rule, *Exercise of Time-Limited Authority To Increase the Fiscal Year 2019 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program*, 84 FR 20005, 20021 (May 8, 2019).

were issued an H-2B visa or granted H-2B status in the past 3 fiscal years was appropriate, as it mirrored the standard that Congress designated in previous returning worker provisions. On June 5, 2019, approximately 30 days after the supplemental visas became available, USCIS announced that it received sufficient petitions filed pursuant to the FY 2019 supplemental cap increase. USCIS did not conduct a lottery for the FY 2019 supplemental cap increase. The total number of H-2B workers approved towards the FY 2019 supplemental cap increase was 32,666.<sup>26</sup> The vast majority of these petitions requested premium processing and were adjudicated within 15 calendar days.

Although Congress provided the Secretary of Homeland Security with the discretionary authority to increase the H-2B cap in FY 2020, the Secretary did not exercise that authority. DHS initially intended to exercise its authority and, on March 4, 2020, announced that it would make available 35,000 supplemental H-2B visas for the second half of fiscal year.<sup>27</sup> On March 13, 2020, then-President Trump declared a National Emergency concerning COVID-19, a communicable disease caused by the coronavirus SARS-CoV-2.<sup>28</sup> On April 2, 2020, DHS announced that the rule to increase the H-2B cap was on hold due to economic circumstances, and no additional H-2B visas would be released until further notice.<sup>29</sup> DHS also noted that the Department of State had suspended routine visa services.<sup>30</sup>

In FY 2021, although the COVID-19 public health emergency remained in effect, DHS in consultation with DOL determined it was appropriate to increase the H-2B cap coupled with additional protections (for example, post-adjudication audits, investigations, and compliance checks), for FY 2021 based on the demand for H-2B workers in the second half of FY 2021, as

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<sup>26</sup> The number of approved workers exceeded the number of additional visas authorized for FY 2019 to allow for the possibility that some approved workers would either not seek a visa or admission, would not be issued a visa, or would not be admitted to the United States. USCIS data pulled from CLAIMS3 on Mar. 15, 2021.

<sup>27</sup> DHS to Improve Integrity of Visa Program for Foreign Workers, March 5, 2020, <https://www.dhs.gov/news/2020/03/05/dhs-improve-integrity-visa-program-foreign-workers>.

<sup>28</sup> Proclamation 9994 of Mar. 13, 2020, *Declaring a National Emergency Concerning the Coronavirus Disease (COVID-19) Outbreak*, 85 FR 15337 (Mar. 18, 2020).

<sup>29</sup> <https://twitter.com/DHSgov/status/1245745115458568192?s=20>

<sup>30</sup> *Id.*



well as other factors that were occurring at that time, including the continuing economic growth, the improving job market, and increased visa processing capacity by the Department of State. Accordingly, on May 25, 2021, DHS and DOL jointly published a temporary final rule authorizing an increase of up to 22,000 additional H-2B visas for the remainder of FY 2021.<sup>31</sup> The supplemental visas were available only to employers that attested they were likely to suffer irreparable harm without the additional workers. The allocation of 22,000 additional H-2B visas under that rule consisted of 16,000 visas available only to H-2B returning workers from one of the last three fiscal years (FY 2018, 2019, or 2020) and 6,000 visas that were initially reserved for Salvadoran, Guatemalan, and Honduran nationals, who were exempt from the returning worker requirement. As of August 13, 2021, USCIS received enough petitions for returning workers to reach the additional 22,000 H-2B visas made available under the FY 2021 H-2B supplemental visa temporary final rule.<sup>32</sup>

Similarly, although the COVID-19 public health emergency is still in effect, DHS in consultation with DOL believes that it is appropriate to increase the H-2B cap for FY 2022 positions with start dates on or before March 31, 2022, based on the demand for H-2B workers in the first half of FY 2022, recent and continuing economic growth, increased labor demand,<sup>33</sup> and increased visa processing capacity by the Department of State. DHS believes it is appropriate to limit the increase for the FY 2022 H-2B cap provided in this temporary final rule to those petitions with start dates on or before March 31, 2022, as data clearly indicates an immediate need for supplemental H-2B visas in FY 2022 for positions with start dates in the first half of the fiscal year, as demonstrated by the FY 2022 first half cap being met even prior to the start of the

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<sup>31</sup> 86 FR 28198 (May 25, 2021).

<sup>32</sup> <https://www.uscis.gov/news/alerts/cap-reached-for-remaining-h-2b-visas-for-returning-workers-for-fy-2021> (Aug. 19, 2021).

<sup>33</sup> The term “increased labor demand” in this context relies on the most recently released figure from the Bureau of Labor Statistics (BLS) survey at the time this TFR was written. The BLS Job Openings and Labor Turnover Survey (JOLTS) reports 11 million job openings in October 2021 (compared to 6.8 million job openings in October 2020). See Bureau of Labor Statistics, Job Openings and Labor Turnover Survey released on December 8, 2021 at [https://www.bls.gov/news.release/archives/jolts\\_12082021.htm](https://www.bls.gov/news.release/archives/jolts_12082021.htm).

fiscal year, the earliest the first half H-2B cap has been reached in more than a decade. DHS and DOL also believe that it is appropriate to couple this cap increase with additional workers protections, as described below.

#### **D. Joint Issuance of the Final Rule**

As they did in FY 2017, FY 2018, FY 2019, and FY 2021, DHS and DOL (the Departments) have determined that it is appropriate to jointly issue this temporary final rule.<sup>34</sup> The determination to issue the temporary final rule jointly follows conflicting court decisions concerning DOL's authority to independently issue legislative rules to carry out its consultative and delegated functions pertaining to the H-2B program under the INA.<sup>35</sup> Although DHS and DOL each have authority to independently issue rules implementing their respective duties under the H-2B program,<sup>36</sup> the Departments are implementing the numerical increase in this manner to ensure there can be no question about the authority underlying the administration and enforcement of the temporary cap increase. This approach is consistent with rules implementing DOL's general consultative role under INA section 214(c)(1), 8 U.S.C. 1184(c)(1), and delegated functions under INA sections 103(a)(6) and 214(c)(14)(B), 8 U.S.C. 1103(a)(6), 1184(c)(14)(B).<sup>37</sup>

### **III. Discussion**

#### **A. Statutory Determination**

Following consultation with the Secretary of Labor, the Secretary of Homeland Security has determined that the needs of some U.S. employers cannot be satisfied in the first half of FY 2022 with U.S. workers who are willing, qualified, and able to perform temporary nonagricultural labor. In accordance with the FY 2022 continuing resolution extending the

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<sup>34</sup> 82 FR 32987 (Jul. 19, 2017); 83 FR 24905 (May 31, 2018); 84 FR 20005 (May 8, 2019); 86 FR 28198 (May 25, 2021).

<sup>35</sup> See *Outdoor Amusement Bus. Ass'n v. Dep't of Homeland Sec.*, 983 F.3d 671 (4th Cir. 2020), *cert. denied*, --- S. Ct. ---, 2021 WL 5043596 (2021); see also *Temporary Non-Agricultural Employment of H-2B Aliens in the United States*, 80 FR 24041, 24045 (Apr. 29, 2015).

<sup>36</sup> See *Outdoor Amusement Bus. Ass'n*, 983 F.3d at 684-89.

<sup>37</sup> See 8 CFR 214.2(h)(6)(iii)(A) and (C), (h)(6)(iv)(A).

authority provided in section 105 of the FY 2021 Omnibus, the Secretary of Homeland Security has determined that it is appropriate, for the reasons stated below, to raise the numerical limitation on H-2B nonimmigrant visas for positions with start dates on or before March 31, 2022 up to 20,000 additional visas for those American businesses that attest that they are suffering irreparable harm or will suffer impending irreparable harm, in other words, a permanent and severe financial loss, without the ability to employ all of the H-2B workers requested on their petition. These businesses must retain documentation, as described below, supporting this attestation.

As they did in connection with the FY 2021 H-2B supplemental visa temporary final rule, and consistent with their existing authority, DHS and DOL intend to conduct a significant number of audits with respect to petitions filed under this, and previous TFRs, requesting supplemental H-2B visas, which may be selected at the discretion of the Departments, during the period of temporary need to verify compliance with H-2B program requirements, including the irreparable harm standard as well as other key worker protection provisions implemented through this rule. If an employer's documentation does not meet the irreparable harm standard, or if the employer fails to provide evidence demonstrating irreparable harm or comply with the audit process, this may be considered a substantial violation resulting in an adverse agency action on the employer, including revocation of the petition and/or TLC or program debarment. Some audits conducted of employers that received visas under the supplemental cap in FY 2021 have revealed concerns surrounding their documentation of irreparable harm, recruitment efforts, and compliance with the audit process, which may warrant further review and action.

The Secretary of Homeland Security has also again determined, as in FY 2021, that for certain employers, additional recruitment steps are necessary to confirm that there are no qualified U.S. workers available for the positions. In addition, the Secretary of Homeland Security has determined that the supplemental visas will be limited to returning workers, with the exception that up to 6,500 of the 20,000 visas will be exempt from the returning worker

requirement and will be reserved for H-2B workers who are nationals of El Salvador, Guatemala, Honduras, and Haiti.<sup>38</sup> As in FY 2021, these H-2B visas are being reserved for nationals of El Salvador, Guatemala, and Honduras to once again further the objectives of E.O. 14010, which among other initiatives, instructs the Secretary of Homeland Security and the Secretary of State to implement measures to enhance access to visa programs for individuals from the Northern Triangle countries.<sup>39</sup> DHS observed robust employer interest in response to the FY 2021 H-2B supplemental visa allocation for Salvadoran, Guatemalan, and Honduran nationals, with USCIS approving petitions on behalf of 6,805 beneficiaries under this allocation.<sup>40</sup> In addition, DHS and the Biden administration have continued to conduct outreach efforts promoting the H-2B program, among others, as a lawful pathway for nationals of El Salvador, Guatemala, and Honduras to work in the United States. The decision to again reserve an allocation of supplemental H-2B visas for these nationals, while providing an exemption from the returning worker requirement, will provide ongoing support for the President’s vision of expanding access to lawful pathways for protection and opportunity for individuals from the Northern Triangle countries.<sup>41</sup>

Additionally, with this temporary final rule, the 6,500 supplemental cap allocation exempted from the returning worker requirement is now also available to nationals of Haiti. In

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<sup>38</sup> These conditions and limitations are not inconsistent with sections 214(g)(3) (“first in, first out” H-2B processing) and (g)(10) (fiscal year H-2B allocations) because noncitizens covered by the special allocation under section 105 of the FY 2021 Omnibus are not “subject to the numerical limitations of [section 214(g)(1).]” *See, e.g.*, INA section 214(g)(3); INA section 214(g)(10); FY 2021 Omnibus div. O, sec. 105 (“Notwithstanding the numerical limitation set forth in section 214(g)(1)(B) of the [INA] . . .”).

<sup>39</sup> *See* Section 3(c) of E.O. 14010, Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border, signed February 2, 2021, <https://www.govinfo.gov/content/pkg/FR-2021-02-05/pdf/2021-02561.pdf>.

<sup>40</sup> While USCIS approved a greater number of beneficiaries from the Northern Triangle countries than the 6,000 visas allocated under the FY 2021 supplemental cap for those countries, the Department of State approved 3,065 visas on behalf of nationals from those countries. *See* DHS, USCIS, Office of Performance and Quality, SAS PME C3 Consolidated, VIBE, DOS Visa Issuance Data queried 11.2021, TRK 8598. This discrepancy can be attributed to adverse impacts on consular processing caused by the COVID-19 pandemic, travel restrictions, as well as lack of readily available processes to efficiently match workers from Northern Triangle countries with U.S. recruiters/employers on an expedited timeline. DHS anticipates that the normalization of consular services, easing of travel restrictions, the issuance of this rule earlier in the fiscal year, as well as the fact that this is the second year that DHS will make a specific allocation available for workers from the Northern Triangle countries, will contribute to greater utilization of available visas under this allocation during FY 2022.

<sup>41</sup> *Id.*

also providing this supplemental cap reservation to nationals of Haiti, DHS recognizes the recent challenges, such as political instability, increasing gang-related violence, and a 7.2 magnitude earthquake that have occurred in that country, and believes that the H-2B program will provide a stabilizing lawful channel for Haitian nationals seeking to enter the United States for economic opportunities. As DHS emphasized in its recent notice adding Haiti to the list of countries whose nationals are eligible to participate in the H-2A and H-2B programs, sustainable development and the stability of Haiti is vital to the interests of the United States as a close partner and neighbor.<sup>42</sup>

Similar to the temporary final rules for the FY 2019 and FY 2021 supplemental caps, the Secretary of Homeland Security has also determined to limit the supplemental visas to H-2B returning workers, in other words, workers who were issued H-2B visas or were otherwise granted H-2B status in FY 2019, 2020, or 2021,<sup>43</sup> unless the employer indicates on the new attestation form that it is requesting workers who are nationals of one of the Northern Triangle countries or Haiti and who are therefore counted towards the 6,500 allotment regardless of whether they are new or returning workers. If the 6,500 returning worker exemption cap for Salvadoran, Guatemalan, Honduran, and Haitian nationals has been reached and visas remain available under the returning worker cap, the petition would be rejected and any fees submitted returned to the petitioner. In such a case, a petitioner may continue to request workers who are nationals of one of the Northern Triangle countries or Haiti, but the petitioner must file a new Form I-129 petition, with fee, and attest that these noncitizens will be returning workers, in other words, workers who were issued H-2B visas or were otherwise granted H-2B status in FY 2019, 2020, or 2021. Unlike the temporary final rule for the FY 2021 supplemental cap, if the 6,500 returning worker exemption cap for nationals of the Northern Triangle countries and Haiti

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<sup>42</sup> See *Identification of Foreign Countries Whose Nationals Are Eligible To Participate in the H-2A and H-2B Nonimmigrant Worker Programs*, 86 FR 62559, 62562, <https://www.govinfo.gov/content/pkg/FR-2021-11-10/pdf/2021-24534.pdf> (Nov. 10, 2021).

<sup>43</sup> For purposes of this rule, these returning workers could have been H-2B cap exempt or extended H-2B status in FY 2019, 2020, or 2021. Additionally they may have been previously counted against the annual H-2B cap of 66,000 visas during FY 2019, 2020, or 2021, or the supplemental caps in FY 2019 or FY 2021.

remains unfilled, DHS will *not* make unfilled visas reserved for Northern Triangle countries and Haiti available to the general returning worker cap.

The Secretary of Homeland Security's determination to increase the numerical limitation is based, in part, on the conclusion that some businesses are suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all of the H-2B workers requested on their petition. Members of Congress have informed the Secretaries of Homeland Security and Labor about the needs of some U.S. businesses for H-2B workers (after the statutory cap for the relevant half of the fiscal year has been reached) and about the potentially negative impact on state and local economies if the cap is not increased.<sup>44</sup> U.S. businesses, chambers of commerce, employer organizations, and state and local elected officials have also expressed concerns to the DHS and Labor Secretaries regarding the unavailability of H-2B visas after the statutory cap was reached.<sup>45</sup>

After considering the full range of evidence and diverse points of view, the Secretary of Homeland Security has deemed it appropriate to take action to prevent further severe and permanent financial loss for those employers currently suffering irreparable harm and to avoid impending irreparable harm for other employers unable to obtain H-2B workers under the statutory cap, including potential wage and job losses by their U.S. workers, as well as other adverse downstream economic effects.<sup>46</sup> While the previous standard focused on avoidance of irreparable harm in the future, this rule recognizes that some employers may already be suffering irreparable harm, that is severe and permanent financial loss, and so the aim of the revised irreparable harm standard with respect to those employers that will benefit from this TFR is to prevent further severe and permanent financial loss by allowing these employers to also obtain H-2B workers. At the same time, the Secretary of Homeland Security believes it is appropriate

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<sup>44</sup> See the docket for this rulemaking for access to these letters.

<sup>45</sup> *Id.*

<sup>46</sup> See, e.g., Impacts of the H-2B Visa Program for Seasonal Workers on Maryland's Seafood Industry and Economy, Maryland Department of Agriculture Seafood Marketing Program and Chesapeake Bay Seafood Industry Association (March 2, 2020), available at <https://mda.maryland.gov/documents/2020-H2B-Impact-Study.pdf> (last visited Dec. 1, 2021).

to condition receipt of supplemental visas on adherence to additional worker protections, as discussed below.

The decision to afford the benefits of this temporary cap increase to U.S. businesses that need H-2B workers because they are suffering irreparable harm already or will suffer impending irreparable harm, and that will comply with additional worker protections, rather than applying the cap increase to any and all businesses seeking temporary workers, is consistent with DHS's time-limited authority to increase the cap, as explained below. The Secretary of Homeland Security, in implementing section 105 and determining the scope of any such increase, has broad discretion, following consultation with the Secretary of Labor, to identify the business needs that are most relevant, while bearing in mind the need to protect U.S. workers. Within that context, for the below reasons, the Secretary of Homeland Security has determined to allow an overall increase of up to 20,000 additional visas, for positions with start dates on or before March 31, 2022, solely for the businesses facing permanent, severe financial loss or those who will face such loss in the near future.

First, DHS interprets section 105's reference to "the needs of American businesses" as describing a need different from the need ordinarily required of employers in petitioning for an H-2B worker. Under the generally applicable H-2B program, each individual H-2B employer must demonstrate that it has a temporary need for the services or labor for which it seeks to hire H-2B workers. *See* 8 CFR 214.2(h)(6)(ii); 20 CFR 655.6. The use of the phrase "needs of American businesses," which is not found in INA section 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b), or the regulations governing the standard H-2B cap, authorizes the Secretary of Homeland Security in allocating additional H-2B visas under section 105 to require that employers establish a need above and beyond the normal standard under the H-2B program, that is, an inability to find sufficient qualified U.S. workers willing and available to perform services or labor and that the employment of the H-2B worker will not adversely affect the

wages and working conditions of U.S. workers, *see* 8 CFR 214.2(h)(6)(i)(A). DOL concurs with this interpretation.

Second, the approach set forth in this rule limits the increase in a way that is similar to the implementation of the supplemental caps in fiscal years 2017, 2018, 2019, and 2021, and provides protections against adverse effects on U.S. workers that may result from a cap increase. Although there is not enough time to conduct a more full and formal quantitative analysis of such adverse effects, the Secretary has determined that in the particular circumstances presented here, it is appropriate, within the limits discussed below, to tailor the availability of this temporary cap increase to those businesses that are suffering irreparable harm or will suffer impending irreparable harm, in other words, those facing permanent and severe financial loss.

As noted above, to address the increased and, in some cases, impending need for H-2B workers in positions with start dates on or before March 31, 2022, the Secretary of Homeland Security has determined that employers may petition for supplemental visas on behalf of up to 13,500 workers who were issued an H-2B visa or were otherwise granted H-2B status in FY 2019, 2020, or 2021.<sup>47</sup> The last 3 fiscal years' temporal limitation in the returning worker definition in this temporary rule mirrors the temporal limitation Congress imposed in previous returning worker statutes.<sup>48</sup> Such workers (in other words, those who recently participated in the H-2B program) have previously obtained H-2B visas and therefore have been vetted by DOS, would have departed the United States after their authorized period of stay as generally required by the terms of their nonimmigrant admission, and therefore may obtain their new visas through DOS and begin work more expeditiously.<sup>49</sup> DOS has informed DHS that, in general, H-2B visa

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<sup>47</sup> DHS believes that this temporal limitation is appropriate even though H-2B visa issuances and admissions were lower in FY 2020 than in previous years, likely due to the impacts of COVID-19, as DHS believes that there will still be a sufficient number of returning workers available to U.S. employers to use the 13,500 additional visas authorized by this rule.

<sup>48</sup> Consolidated Appropriations Act, 2016, Public Law 114-113, div. F, tit. V, sec 565; John Warner National Defense Authorization Act for Fiscal Year 2007, Public Law 109-364, div. A, tit. X, sec. 1074, (2006); Save Our Small and Seasonal Businesses Act of 2005, Public Law. 109-13, div. B, tit. IV, sec. 402.

<sup>49</sup> The previous review of an applicant's qualifications and current evidence of lawful travel to the United States will generally lead to a shorter processing time of a renewal application. In addition, U.S. Department of State



applicants who are able to demonstrate clearly that they have previously abided by the terms of their status granted by DHS have a higher visa issuance rate when applying to renew their H-2B visas, as compared with the overall visa applicant pool from a given country. Furthermore, consular officers are authorized to waive the in-person interview requirement for certain H-2B applicants seeking to renew their visa within a specific timeframe of that visa's expiration, and who otherwise meet the strict limitations set out under INA section 222(h), 8 U.S.C. 1202(h). We note that DOS has, in response to the COVID-19 pandemic, expanded interview waiver eligibility to certain first-time H-2 applicants<sup>50</sup> potentially allowing such applicants to be processed with increased efficiency. However, there is no indication that this temporary measure will necessarily affect the overall visa issuance rates of applicants, which DOS has indicated is higher for returning workers who can demonstrate prior compliance with the program.

Limiting the supplemental cap to returning workers is beneficial because these workers have generally followed immigration law in good faith and demonstrated their willingness to return home after they have completed their temporary labor or services or their period of authorized stay, which is a condition of H-2B status. The returning worker condition therefore provides a basis to believe that H-2B workers under this cap increase will again abide by the terms and conditions of their visa or nonimmigrant status. The returning worker condition also benefits employers that seek to re-hire known and trusted workers who have a proven positive employment track record while previously employed as workers in this country. While the Departments recognize that the returning worker requirement may limit to an extent the flexibility of employers that might wish to hire non-returning workers, the requirement provides

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consular officers temporarily have flexibility to waive the personal appearance of certain nonimmigrant visa applicants. *See, e.g.*, 86 FR 70735 (Dec. 13, 2021); *see also* DOS website, Important Announcement on Waivers of the Interview Requirement for Certain Nonimmigrant Visas, <https://travel.state.gov/content/travel/en/News/visas-news/important-announcement-on-waivers-of-the-interview-requirement-for-certain-nonimmigrant-visas.html> (last updated Dec. 23, 2021).

<sup>50</sup> Some consular sections waive the in-person interview requirement for certain H-2B applicants and who otherwise meet the strict limitations set out under INA section 222(h), 8 U.S.C. 1202(h). The authority allowing for waiver of interview of certain H-2 (temporary agricultural and non-agricultural workers) applicants is extended through the end of 2022. DOS, *Important Announcement on Waivers of the Interview Requirement for Certain Nonimmigrant Visas*, <https://travel.state.gov/content/travel/en/News/visas-news/important-announcement-on-waivers-of-the-interview-requirement-for-certain-nonimmigrant-visas.html> (last updated Dec. 23, 2021).

an important safeguard against H-2B abuse, which DHS considers to be a significant consideration.

In allocating up to 6,500 H-2B visas to nationals of the Northern Triangle countries and Haiti while making the remaining allocation of up to 13,500 H-2B visas available to qualified returning workers, irrespective of their country of nationality, this rule strikes a balance between furthering the U.S. foreign policy interests of creating a comprehensive, whole-of-government framework – of which this allocation is one piece – to address and manage migration from the Northern Triangle countries and Haiti and addressing the needs of certain H-2B employers that are suffering irreparable harm or will suffer impending irreparable harm. The United States has strong foreign policy interests in allocating up to 6,500 supplemental visas only to nationals of the Northern Triangle countries or Haiti and exempting such persons from the returning worker requirement. The Secretary of Homeland Security has determined that both the 6,500 limitation and the exemption from the returning worker requirement for nationals of the Northern Triangle countries is again beneficial in light of President Biden’s February 2, 2021 E.O. 14010, which instructed the Secretary of Homeland Security and the Secretary of State to implement measures to enhance access for individuals of the Northern Triangle countries to visa programs, as appropriate and consistent with applicable law, and to work toward addressing some of the causes of and managing migration throughout North and Central America. In response to this executive order, DHS seeks to promote and improve safety, security, and economic stability throughout the North and Central American region, and work with these countries to stem the flow of irregular migration in the region and enhance access to visa programs. DHS believes that including nationals of Haiti in this allocation of up to 6,500 supplemental visas will further promote and improve safety, security, and economic stability throughout this region, and is in the interests of the United States as a close partner and neighbor.

The exemption from the returning worker requirement recognizes the small numbers of individuals, approximately 4,400 per year, from the three Northern Triangle countries and Haiti

who were previously granted H-2B visas in recent years.<sup>51</sup> Absent this exemption, there may be insufficient workers from these countries, which means that the rule might thereby fail to achieve its intended policy objective to provide additional temporary foreign workers for U.S. employers that are suffering irreparable harm or will suffer impending irreparable harm, while also enhancing access to the H-2B visa classification for individuals from the Northern Triangle countries and Haiti.

Finally, unlike the temporary final rule for the FY 2021 supplemental cap, this rule does *not* make available unfilled visas from the allocation for nationals of the Northern Triangle countries and Haiti to the general supplemental cap for returning workers. As with the supplemental cap for returning workers, USCIS will stop accepting petitions received under the allocation for the Northern Triangle countries and Haiti after March 31, 2022. This end date is intended to provide H-2B employers ample time, should they choose, to petition for, and bring in, workers under the allocation for the Northern Triangle countries and Haiti. This, in turn, provides an opportunity for employers to contribute to our country's efforts to promote and improve safety, security and economic stability in these countries to help stem the flow of irregular migration to the United States.

For all petitions filed under this rule and the H-2B program, generally, employers must establish, among other requirements, that insufficient qualified U.S. workers are available to fill the petitioning H-2B employer's job opportunity and that the foreign worker's employment in the job opportunity will not adversely affect the wages or working conditions of similarly-employed U.S. workers. INA section 214(c)(1), 8 U.S.C. 1184(c)(1); 8 CFR 214.2(h)(6)(iii)(A) and (D); 20 CFR 655.1. To meet this standard of protection for U.S. workers and, in order to be eligible for additional visas under this rule, employers must have applied for and received a valid

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<sup>51</sup> DOS issued a combined total of approximately 26,630 H-2B visas to nationals of the Northern Triangle countries and Haiti from FY 2015 through FY 2020, or approximately 4,400 per year. DOS Monthly NIV Issuances by Nationality and Visa Class; <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html> (last visited Dec. 03, 2021).

TLC in accordance with 8 CFR 214.2(h)(6)(iv)(A) and (D) and 20 CFR part 655, subpart A.

Under DOL's H-2B regulations, TLCs are valid only for the period of employment certified by DOL and expire on the last day of authorized employment. 20 CFR 655.55(a).

In order to have a valid TLC, therefore, the employment start date on the employer's H-2B petition must not be different from the employment start date certified by DOL on the TLC. *See* 8 CFR 214.2(h)(6)(iv)(D). Under generally applicable DHS regulations, the only exception to this requirement applies when an employer files an amended visa petition, accompanied by a copy of the previously approved TLC and a copy of the initial visa petition approval notice, at a later date to substitute workers as set forth under 8 CFR 214.2(h)(6)(viii)(B). This rule also requires additional recruitment for certain petitioners, as discussed below.

In sum, this rule increases the FY 2022 numerical limitation by up to 20,000 visas for positions with start dates on or before March 31, 2022, but also restricts the availability of those additional visas by prioritizing only the most significant business needs, and limiting eligibility to H-2B returning workers, unless the worker is a national of one of the Northern Triangle countries or Haiti counted towards the 6,500 allocation that are exempt from the returning worker limitation. These provisions are each described in turn below.

## **B. Numerical Increase and Allocation of up to 20,000 Visas**

The increase of up to 20,000 visas will help address the urgent needs of eligible employers for additional H-2B workers for those employers with employment needs for start dates on or before March 31, 2022.<sup>52</sup> As noted above, DHS is limiting the numerical increase to

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<sup>52</sup> In contrast with section 214(g)(1) of the INA, 8 U.S.C. 1184(g)(1), which establishes a cap on the number of individuals who may be issued visas *or otherwise provided H-2B status* (emphasis added), and section 214(g)(10) of the INA, 8 U.S.C. 1184(g)(10), which imposes a first half of the fiscal year cap on H-2B issuance with respect to the number of individuals who may be issued visas *or are accorded [H-2B] status*" (emphasis added), section 105 only authorizes DHS to increase the number of available H-2B visas. Accordingly, DHS will not permit individuals authorized for H-2B status pursuant to an H-2B petition approved under section 105 to change to H-2B status from another nonimmigrant status. *See* INA section 248, 8 U.S.C. 1258; *see also* 8 CFR part 248. If a petitioner files a petition seeking H-2B workers in accordance with this rule and requests a change of status on behalf of someone in the United States, the change of status request will be denied, but the petition will be adjudicated in accordance with applicable DHS regulations. Any noncitizen authorized for H-2B status under the approved petition would need to obtain the necessary H-2B visa at a consular post abroad and then seek admission to the United States in H-2B status at a port of entry.

those petitions with start dates on or before March 31, 2022, because current data supports the need for additional H-2B workers with start dates during that timeframe.<sup>53</sup> The determination to allow up to 20,000 additional H-2B visas reflects a balancing of a number of factors including the demand for H-2B visas for the first half of FY 2022; current economic conditions; the general trend of increased demand for H-2B visas from FY 2017 to FY 2021; H-2B returning worker data; the amount of time remaining for employers to hire and obtain H-2B workers with start dates on or before March 31, 2022; concerns from Congress, state and local elected officials, U.S. businesses, chambers of commerce, and employer organizations expressing a need for additional H-2B workers; and the objectives of E.O. 14010. DHS believes the numerical increase both addresses the needs of U.S. businesses and, as explained in more detail below, furthers the foreign policy interests of the United States.

Section 105 of the FY 2021 Omnibus sets the highest number of H-2B returning workers who were exempt from the cap in certain previous years as the maximum limit for any increase in the H-2B numerical limitation for FY 2021.<sup>54</sup> Consistent with the statute's reference to H-2B returning workers, in determining the appropriate number by which to increase the H-2B numerical limitation, the Secretary of Homeland Security focused on the number of visas allocated to such workers in years in which Congress enacted returning worker exemptions from the H-2B numerical limitation. During each of the years the returning worker provision was in force, U.S. employers' standard business needs for H-2B workers exceeded the statutory 66,000 cap. The highest number of H-2B returning workers approved was 64,716 in FY 2007. In setting the number of additional H-2B visas to be made available in this temporary final rule for

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<sup>53</sup> On January 4, 2022, DOL's Office of Foreign Labor Certification announced it had received a total of 7,875 H-2B temporary labor certification applications requesting 136,555 workers with the start date of work of April 1, 2022. *See* <https://www.dol.gov/agencies/eta/foreign-labor>. DHS is limiting the supplemental H-2B visas provided by this TFR to those employers with start dates of need on or before March 31, 2022, for the reasons described in this TFR.

<sup>54</sup> During fiscal years 2005 to 2007, and 2016, Congress enacted "returning worker" exemptions to the H-2B visa cap, allowing workers who were counted against the H-2B cap in one of the three preceding fiscal years not to be counted against the upcoming fiscal year cap. Save Our Small and Seasonal Businesses Act of 2005, Public Law 109-13, Sec. 402 (May 11, 2005); John Warner National Defense Authorization Act, Public Law 109-364, Sec. 1074 (Oct. 17, 2006); Consolidated Appropriations Act of 2016, Public Law 114-113, Sec. 565 (Dec. 18, 2015).

those petitioners with start dates on or before March 31, 2022 during FY 2022, DHS considered this number, overall indications of increased need, and the availability of U.S. workers, as discussed below. On the basis of these considerations, DHS determined that it would be appropriate to make available up to 20,000 additional visas under the FY2022 supplemental cap authority. The Secretary further considered the objectives of E.O. 14010, which among other initiatives, instructs the Secretary of Homeland Security and the Secretary of State to implement measures to enhance access to visa programs for individuals from the Northern Triangle countries, as well as to address some of the root causes of and manage migration throughout both North and Central America, including Haiti, and determined that reserving up to 6,500 of the up to 20,000 additional visas and exempting this number from the returning worker requirement for nationals from the Northern Triangle countries or Haiti would be appropriate.

In past years, the number of beneficiaries covered by H-2B petitions filed exceeded the number of additional visas allocated under the three most recent supplemental caps. In FY 2018, USCIS received petitions for approximately 29,000 beneficiaries during the first 5 business days of filing for the 15,000 supplemental cap. USCIS therefore conducted a lottery on June 7, 2018, to randomly select petitions that would be accepted under the supplemental cap. Of the petitions that were selected, USCIS issued approvals for 15,672 beneficiaries.<sup>55</sup> In FY 2019, USCIS received sufficient petitions for the 30,000 supplemental cap on June 5, 2019, but did not conduct a lottery to randomly select petitions that would be accepted under the supplemental cap. Of the petitions received, USCIS issued approvals for 32,717 beneficiaries. In FY 2021, USCIS received a sufficient number of petitions for the 22,000 supplemental cap on August 13, 2021,

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<sup>55</sup> USCIS recognizes it may have received petitions for more than 29,000 supplemental H-2B workers if the cap had not been exceeded within the first 5 days of opening. However, DHS estimates that not all of the 29,000 workers requested under the FY 2018 supplemental cap would have been approved and/or issued visas. For instance, although DHS approved petitions for 15,672 beneficiaries under the FY 2018 cap increase, the Department of State data shows that as of January 15, 2019, it issued only 12,243 visas under that cap increase. Similarly, DHS approved petitions for 12,294 beneficiaries under the FY 2017 cap increase, but the Department of State data shows that it issued only 9,160 visas.

including a significant number of workers from Northern Triangle countries.<sup>56</sup> Of the petitions received, USCIS issued approvals for 30,211 beneficiaries, including approvals for 6,805 beneficiaries under the allocation for the nationals of the Northern Triangle.<sup>57</sup>

Data for the first half of FY 2022 clearly indicate an immediate need for supplemental H-2B visas in FY 2022 for positions with start dates between October 1, 2021 through March 31, 2022. As of December 1, 2021, DOL's Office of Foreign Labor Certification (OFLC) reports having certified 2,469 TLC applications with requested dates of need in the first half of FY 2022 for 65,717 H-2B visas.<sup>58</sup> Furthermore, as noted above, USCIS received a sufficient number of H-2B petitions to reach the first half of the FY 2022 fiscal year statutory cap prior to the start of the fiscal year.<sup>59</sup>

In addition, although the public health emergency due to COVID-19 still exists,<sup>60</sup> DHS believes that issuing additional H-2B visas for positions with start dates on or before March 31, 2022 is appropriate in the context of the nation's economic recovery from the ongoing pandemic. In March 2020, the U.S. labor market was severely affected by the onset of the COVID-19 pandemic, pushing the national unemployment rate to near record levels and resulting in millions of U.S. workers being displaced from work. In fiscal year 2021, approximately 88 percent of H-

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<sup>56</sup> On June 3, USCIS announced that it had received enough petitions to reach the cap for the additional 16,000 H-2B visas made available for returning workers only, but that it would continue accepting petitions for the additional 6,000 visas allotted for nationals of the Northern Triangle countries. *See* <https://www.uscis.gov/news/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-fy-2021> (June 3, 2021). On July 23, 2021, USCIS announced that, because it did not receive enough petitions to reach the allocation for the Northern Triangle countries by the July 8 filing deadline, the few remaining visas were available to H-2B returning workers regardless of their country of origin. *See* <https://www.uscis.gov/news/alerts/employers-may-file-h-2b-petitions-for-returning-workers-for-fy-2021> (July 23, 2021).

<sup>57</sup> The number of approved workers exceeded the number of additional visas authorized for FY 2018, FY 2019, as well as for FY 2021 to allow for the possibility that some approved workers would either not seek a visa or admission, would not be issued a visa, or would not be admitted to the United States.

<sup>58</sup> Processing Times, <https://flag.dol.gov/processingtimes> (last visited Dec. 2, 2021).

<sup>59</sup> On October 12, 2021, USCIS announced that it had received sufficient petitions to reach the congressionally mandated cap on H-2B visas for temporary nonagricultural workers for the first half of fiscal year 2022, and that Sept. 30, 2021 was the final receipt date for new cap-subject H-2B worker petitions requesting an employment start date before April 1, 2022. *See* USCIS, USCIS Reaches H-2B Cap for First Half of FY 2022, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2022> (Oct 12, 2021).

<sup>60</sup> *See* HHS Renewal of Determination That A Public Health Emergency Exists, <https://www.phe.gov/emergency/news/healthactions/phe/Pages/COVID-15Oct21.aspx> (Oct. 15, 2021).

2B filings were for positions within just 5 sectors.<sup>61</sup> NAICS 56 (Administrative and Support and Waste Management and Remediation Services) accounted for 41.7% of filings, NAICS 71 (Accommodation and Food Services) accounted for 17.1%, NAICS 72 (Arts, Entertainment, and Recreation) accounted for 14.5%, NAICS 23 (Construction) accounted for 9.5%, and NAICS 11 (Agriculture, Forestry, Fishing and Hunting) accounted for 5% of filings.

Within these industries, DOL data show increased labor demand over the last year. More specifically, DOL data from the Job Openings and Labor Turnover Survey (JOLTS) show that the rate of job openings<sup>62</sup> increased for all 5 industries between October 2020 and October 2021. The job opening rate for NAICS 56<sup>63</sup> increased from 5.7 to 7.9 while the job opening rate for NAICS 71 went from 5.2 to 7.6. The job opening rate for NAICS 72 went from 6.3 to 10.7 while the rate for NAICS 23 went from 3.3 to 5.2. The job opening rate for NAICS 11<sup>64</sup> increased from 3.4 to 5.3.

Year-over-year change in Job Opening Rate <sup>65</sup>				
NAICS 11	NAICS 23	NAICS 56	NAICS 71	NAICS 72
1.9	1.9	2.2	2.4	4.4

The increase in the job openings rate across these industries is a clear indication of increased labor demand within these industries. The Departments believe that the supplemental allocation

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<sup>61</sup> USCIS analysis of DOL OLFC Performance data.

<sup>62</sup> The JOLTS News Release states that the job openings rate is calculated by dividing the number of job openings by the sum of employment and job openings and multiplying that quotient by 100. See <https://www.bls.gov/news.release/jolts.htm>.

<sup>63</sup> JOLTS data presented here are for the Professional and Business Services Supersector, which is comprised of NAICS 54, NAICS 55 and NAICS 56. See <https://www.bls.gov/iag/tgs/iag60.htm>. As such, the data presented here should be understood to be the best possible proxy for changes in NAICS 56 and not a direct measurement of any specific change in the actual underlying sectors. The latest data available, for November 2021, from the Department of Labor's Current Employment Statistics program indicates that NAICS 56 accounted for just under 42% of employment in Professional Business Services. All data accessed December 22, 2021.

<sup>64</sup> JOLTS data presented here are for Mining and Logging, which is part of the Natural Resources and Mining Supersector. This supersector is comprised of NAICS 11 (Agriculture, Forestry, Fishing and Hunting) and NAICS 21 (Mining, Quarrying, and Oil and Gas Extraction). See <https://www.bls.gov/iag/tgs/iag10.htm>. As such, the data presented here should be understood to be the best possible proxy for changes in NAICS 11 and not a direct measurement of any specific change in the actual underlying sectors. The latest data available, for November 2021, from the Department of Labor's Current Employment Statistics program indicates that NAICS 11 accounted for just under 7% of employment in Mining and Logging.

<sup>65</sup> Year-over-year change was calculated as the difference between the October 2021 value for the respective industry and the October 2020 value. See <https://www.bls.gov/jlt/#data>. All data accessed December 22, 2021.



of H-2B visas described in this temporary final rule will help to meet increased job openings in these industries.

In addition, DOS recently announced that, as worldwide restrictions due to the COVID-19 pandemic begin to ease, and in line with the President's proclamation regarding the safe resumption of international travel,<sup>66</sup> the Bureau of Consular Affairs is focusing on reducing wait times for all consular services at embassies and consulates overseas while also protecting health and safety of staff and applicants.<sup>67</sup> We note, however, that amid growing concern about the COVID Omicron variant, a highly mutated form of the COVID virus that is now documented in dozens of countries and numerous states within the U.S., the Centers for Disease Control and Prevention (CDC) recently tightened testing requirements for international air travel to the United States, which may have an impact on such travel.<sup>68</sup> Given the level of demand for H-2B workers, the continued and projected economic recovery, the continued and projected job growth, and the resumption of visa processing services, DHS believes it is appropriate at this time to release additional visas for positions with start dates on or before March 31, 2022. Further, DHS believes that 20,000 is an appropriate number of visas for the reasons discussed above.

Finally, recognizing the high demand for H-2B visas, it is plausible that the additional H-2B supplemental allocations provided in this rule will be reached before March 31, 2022.

Specifically, the following scenarios may still occur:

- The 13,500 supplemental cap visas limited to returning workers that will be immediately available for employers will be reached before March 31, 2022.

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<sup>66</sup> Proclamation 10294 of Oct. 25, 2021, *Advancing the Safe Resumption of Global Travel During the COVID-19 Pandemic*, 86 FR 59603 (Oct. 28, 2021).

<sup>67</sup> DOS, Visa Services Operating Status Update, <https://travel.state.gov/content/travel/en/News/visas-news/visa-services-operating-status-update.html> (Nov. 19, 2021).

<sup>68</sup> See CDC, Requirement for Proof of Negative COVID-19 Test or Documentation of Recovery from COVID-19, *Requirement for Proof of Negative COVID-19 Test or Documentation of Recovery from COVID-19* (Dec. 2, 2021). Changes made prior to the emergence of Omicron also reflect the evolving nature of the pandemic and potential impacts on international air travel by H-2B workers. See 86 FR 59603 (Oct. 28, 2021) (Presidential Proclamation); see also 86 FR 61224 (Nov. 5, 2021) (implementing CDC Order).

- The 6,500 supplemental cap visas limited to nationals of the Northern Triangle countries and Haiti will be reached before March 31, 2022.

DHS regulation, 8 CFR 214.2(h)(6)(xi)(E), reaffirms the use of the processes that are in place when H-2B numerical limitations under INA section 214(g)(1)(B) or (g)(10), 8 U.S.C. 1184(g)(1)(B) or (g)(10), are reached, as applicable to each of the scenarios described above that involve numerical limitations of the supplemental cap. Specifically, for each of the scenarios mentioned above, DHS will monitor petitions received, and make projections of the number of petitions necessary to achieve the projected numerical limit of approvals. USCIS will also notify the public of the dates that USCIS has received the necessary number of petitions (the “final receipt dates”) for each of these scenarios. The day the public is notified will not control the final receipt dates. Moreover, USCIS may randomly select, via computer-generated selection, from among the petitions received on the final receipt date the remaining number of petitions deemed necessary to generate the numerical limit of approvals for each of the scenarios involving numerical limitations to the supplemental cap. USCIS may, but will not necessarily, conduct a lottery if: the 13,500 supplemental cap visas for returning workers is reached before March 31, 2022; or the 6,500 visas limited to nationals of the Northern Triangle countries and Haiti is reached before March 31, 2022. Finally, similar to the processes applicable to the H-2B semi-annual statutory cap, if the final receipt date is any of the first 5 business days on which petitions subject to the applicable numerical limit may be received (in other words, if the numerical limit is reached on any one of the first 5 business days that filings can be made), USCIS will randomly apply all of the numbers among the petitions received on any of those 5 business days.

### **C. Returning Workers**

Similar to the temporary increases in FY 2019 and FY 2021, the Secretary of Homeland Security has determined that the supplemental visas should be granted to returning workers from the past 3 fiscal years, in order to meet the immediate need for H-2B workers, unless the H-2B

worker is a national of one of the Northern Triangle countries or Haiti and is counted towards the separate 6,500 cap for such workers. The Secretary has determined that, for purposes of this program, H-2B returning workers include those individuals who were issued an H-2B visa or were otherwise granted H-2B status in FY 2019, 2020, or 2021. As discussed above, the Secretary determined that limiting returning workers to those who were issued an H-2B visa or granted H-2B status in the past three fiscal years is appropriate as it mirrors the standard that Congress designated in previous returning worker provisions. Returning workers have previously obtained H-2B visas and therefore been vetted by DOS, would have departed the United States after their authorized period of stay as generally required by the terms of their nonimmigrant admission, and therefore may have a higher likelihood of success in obtaining their new visas through DOS, possibly without a required interview, and begin work more expeditiously.

To ensure compliance with the requirement that additional visas only be made available to returning workers, petitioners seeking H-2B workers under the supplemental cap will be required to attest that each employee requested or instructed to apply for a visa under the FY 2022 supplemental cap was issued an H-2B visa or otherwise granted H-2B status in FY 2019, 2020, or 2021, unless the H-2B worker is a national of one of the Northern Triangle countries or Haiti and is counted towards the 6,500 cap. This attestation will serve as prima facie initial evidence to DHS that each worker, unless a national of one of the Northern Triangle countries or Haiti who is counted against the 6,500 cap, meets the returning worker requirement. DHS and DOS retain the right to review and verify that each beneficiary is in fact a returning worker any time before and after approval of the petition or visa. DHS has authority to review and verify this attestation during the course of an audit or investigation.

**D. Returning Worker Exemption for up to 6,500 Visas for Nationals of Guatemala, El Salvador, and Honduras (Northern Triangle Countries) and Haiti**

As described above, the Secretary of Homeland Security has determined that up to 6,500 additional H-2B visas will be limited to workers who are nationals of one of the Northern Triangle countries or Haiti. These 6,500 visas will be exempt from the returning worker requirement. If the 6,500 visa limit has been reached and the 13,500 cap has not, petitioners may continue to request workers who are nationals of one of the Northern Triangle countries or Haiti, but these noncitizens must be specifically requested as returning workers who were issued H-2B visas or were otherwise granted H-2B status in FY 2019, 2020, or 2021.

DHS has determined that reserving 6,500 supplemental H-2B visas for nationals of the Northern Triangle countries or Haiti – a number higher than the average annual number of visas issued to such persons in the past 7 fiscal years – will encourage U.S. employers that are suffering irreparable harm or will suffer impending irreparable harm to seek out workers from such countries, while, at the same time, increase interest among nationals of the Northern Triangle countries and Haiti seeking a legal pathway for temporary employment in the United States. DOS issued a combined total of approximately 26,630 H-2B visas to nationals of the Northern Triangle countries or Haiti from FY 2015 through FY 2020, an average of approximately 4,400 per year.<sup>69</sup> In FY 2021, DOS issued a combined total of more than 6,600 visas to nationals of Northern Triangle countries. This increase is likely due in large part to the additional H-2B visas made available to nationals of these countries by the FY 2021 H-2B supplemental visa temporary final rule.<sup>70</sup> In addition, based in part on the vital U.S. interest of promoting sustainable development and the stability of Haiti, DHS recently added Haiti to the list of countries whose nationals are eligible to participate in the H-2A and H-2B programs.<sup>71</sup> Therefore, as previously stated, DHS has determined that the additional increase in FY 2022 will not only provide U.S. businesses who have been unable to find qualified and available U.S.

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<sup>69</sup> DOS Monthly NIV Issuances by Nationality and Visa Class; <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html> (last visited December 1, 2021).

<sup>70</sup> *Id.*

<sup>71</sup> See *Identification of Foreign Countries Whose Nationals Are Eligible To Participate in the H-2A and H-2B Nonimmigrant Worker Programs*, 86 FR 62559, 62562, <https://www.govinfo.gov/content/pkg/FR-2021-11-10/pdf/2021-24534.pdf> (Nov. 10, 2021).

workers with potential workers, but also promote further expansion of lawful immigration and lawful employment authorization for nationals of Northern Triangle countries and Haiti.

While DHS reiterates the importance of limiting the general supplemental cap exclusively to returning workers, for the reasons stated previously, the Secretary has determined that the exemption from the returning worker requirement for nationals of the Northern Triangle countries or Haiti is beneficial for the following reasons. It strikes a balance between furthering the U.S. foreign policy interests of expanding access to lawful pathways to nationals of the Northern Triangle countries and Haiti seeking economic opportunity in the United States and addressing the needs of certain H-2B employers that are suffering irreparable harm or will suffer impending irreparable harm. This policy initiative would also support the strategies for the region described in E.O. 14010, which directs DHS to implement efforts to expand access to lawful pathways to the United States, including visa programs, as appropriate and consistent with the law through both protection-related and non-protection related programs. E.O. 14010 further directs relevant government agencies to create a comprehensive regional framework to address the causes of migration, and to manage migration throughout North and Central America.<sup>72</sup> The availability of workers from the Northern Triangle countries and Haiti may help provide U.S. employers with additional labor from neighboring countries who are committed to working with the United States and also promote safe and lawful immigration to the United States.

Similar to the discussion above regarding returning workers, DOS will work with the relevant countries to facilitate consular interviews, as required,<sup>73</sup> and channels for reporting

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<sup>72</sup> See also National Security Council, Collaborative Migration Management Strategy, <https://www.whitehouse.gov/wp-content/uploads/2021/07/Collaborative-Migration-Management-Strategy.pdf> (July 2021) (stating that “The United States has strong national security, economic, and humanitarian interests in reducing irregular migration and promoting safe, orderly, and humane migration” within North and Central America).

<sup>73</sup> As noted previously, some consular sections waive the in-person interview requirement for H-2B applicants whose prior visa expired within a specific timeframe and who otherwise meet the strict limitations set out under INA section 222(h), 8 U.S.C. 1202(h). The authority allowing for waiver of interview of certain H-2 (temporary agricultural and non-agricultural workers) applicants is extended through the end of 2022. Applicants renewing any visa within 48 months of expiration are also eligible for interview waiver. DOS, *Important Announcement on Waivers of the Interview Requirement for Certain Nonimmigrant Visas*, <https://travel.state.gov/content/travel/en/News/visas-news/important-announcement-on-waivers-of-the-interview-requirement-for-certain-nonimmigrant-visas.html> (last updated Dec. 23, 2021).

incidents of fraud and abuse within the H-2 programs. Further, each country's own consular networks will maintain contact with the workers while in the United States and ensure the workers know their rights and responsibilities under the U.S. immigration laws, which are all valuable protections to the immigration system, U.S. employers, U.S. workers, and workers entering the country on H-2 visas.

Nothing in this rule will limit the authority of DHS or DOS to deny, revoke, or take any other lawful action with respect to an H-2B petition or visa application at any time before or after approval of the H-2B petition or visa application.

#### **E. Business Need Standard – Irreparable Harm and FY 2022 Attestation**

To file any H-2B petition under this rule, petitioners must meet all existing H-2B eligibility requirements, including having an approved, valid, and unexpired TLC. *See* 8 CFR 214.2(h)(6) and 20 CFR part 655, subpart A. In addition, the petitioner must submit an attestation to USCIS in which the petitioner affirms, under penalty of perjury, that it meets the business need standard. Petitioners must be able to establish that they are suffering irreparable harm or will suffer impending irreparable harm (that is, permanent and severe financial loss) without the ability to employ all of the H-2B workers requested on their petition.<sup>74</sup> The TLC process focuses on establishing whether a petitioner has a temporary need for workers and whether there are U.S. workers who are able, willing, qualified, and available to perform the temporary service or labor, and does not address the harm a petitioner is facing or will face in the absence of such workers; the attestation addresses this question. The attestation must be submitted directly to USCIS, together with Form I-129, the approved and valid TLC,<sup>75</sup> and any other necessary documentation. As in the rules implementing the FY 2017, FY 2018, FY 2019,

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<sup>74</sup> An employer may request fewer workers on the H-2B petition than the number of workers listed on the TLC. *See* Instructions for Petition for Nonimmigrant Worker, providing that “the total number of workers you request on the petition must not exceed the number of workers approved by the Department of Labor or Guam Department of Labor, if required, on the temporary labor certification.”

<sup>75</sup> Since July 26, 2019, USCIS has been accepting a printed copy of the electronic one-page ETA-9142B, Final Determination: H-2B Temporary Labor Certification Approval, as an original, approved TLC. *See, Notice of DHS's Requirement of the Temporary Labor Certification Final Determination Under the H-2B Temporary Worker Program*, 85 FR 13178, 13179 (Mar. 6, 2020).

and FY 2021 temporary cap increases, employers will be required to complete the new attestation form which can be found at: <https://www.foreignlaborcert.doleta.gov/form.cfm>.<sup>76</sup>

In previous years petitioners have only been required to attest that they were likely to suffer irreparable harm if they were unable to employ all of the H-2B workers requested on their I-129 petition submitted under H-2B cap increase rules. The Departments have decided to change this standard. Employers must instead attest that they are suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all of the H-2B workers requested on the petition filed under this rule. This change is designed to focus more directly on the actual irreparable harm employers are suffering or the impending irreparable harm they will suffer as a result of their inability to employ H-2B workers, rather than on just the possibility of such harm.

As noted above, Congress authorized the Secretary of Homeland Security, in consultation with the Secretary of Labor, to increase the total number of H-2B visas available “upon the determination that the needs of American businesses cannot be satisfied” with U.S. workers under the statutory visa cap.<sup>77</sup> The new irreparable harm standard in this rule aligns with the determination that Congress requires DHS to make before increasing the number of H-2B visas available to U.S. employers. In particular, requiring employers to attest that they are suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all of the requested H-2B workers is directly relevant to the needs of the business—if an employer is suffering or will suffer irreparable harm, then their needs are not being satisfied. The prior standard, on the other hand, required only that the employer attest that harm was *likely* to occur

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<sup>76</sup> This portion of the temporary rule does not apply to workers who have already been counted under the H-2B statutory cap for the first half of fiscal year 2022 (33,000). Further, this portion of the rule does not apply to noncitizens who are exempt from the fiscal year 2022 H-2B statutory cap, including those who are extending their stay in H-2B status. Accordingly, petitioners who are filing on behalf of such workers are not subject to the attestation requirement.

<sup>77</sup> Pub. L. 117-70 Further Extending Government Funding Act, Division A “Further Continuing Appropriations Act, 2022”, section 101 (Dec. 3, 2021) changing the Pub. L. 117-43 expiration date in section 106(3) from Dec. 3, 2021 to Feb. 18, 2022, and Pub. L. 117-43 Extending Government Funding and Delivering Emergency Assistance Act, Division A “Continuing Appropriations Act, 2022”, Section 101 and 106(3) (Oct. 3, 2021) providing DHS funding and authorities, including authority under section 105 of title I of Division O of Pub. L. 116-260, through December 3, 2021.

at some point in the future, which created uncertainty as to whether that employer's needs were truly unmet or would not be met without being able to employ the requested H-2B workers.

Because the authority to increase the statutory cap is tied to the needs of businesses, the Departments think it is reasonable for employers to attest that they are suffering irreparable harm or that they will suffer impending irreparable harm without the ability to employ all of the H-2B workers requested on their petition. If such employers are unable to attest to such harm and retain and produce documentation of that harm, it calls into question whether their needs cannot in fact be satisfied without the ability to employ H-2B workers. As with employers with a current need, an employer's inability to attest to impending harm calls into question their actual need for the requested H-2B workers.

The change to the irreparable harm standard is also informed by the Departments' experiences in implementing the business need standard. In the Departments' experience, the "likely to suffer irreparable harm" standard has been difficult to assess and administer in the context of prior supplemental cap rules. For example, employers have reported confusion with the standard, including some employers that were not able to provide adequate evidence of the prospective "likelihood of irreparable harm" when selected for a random audit. The Departments therefore believe that asking employers to provide evidence of harm that is occurring or is impending without the ability to employ all of the H-2B workers requested on their petition is a better means of ensuring compliance.

The attestation form will serve as prima facie initial evidence to DHS that the petitioner's business is suffering irreparable harm or will suffer impending irreparable harm. Any petition requesting H-2B workers under this FY 2022 supplemental cap that is lacking the requisite attestation form may be rejected in accordance with 8 CFR 103.2(a)(7)(ii) or denied in accordance with 8 CFR 103.2(b)(8)(ii), as applicable. Although this regulation does not require submission of evidence at the time of filing of the petition, other than an attestation, the employer must have such evidence on hand and ready to present to DHS or DOL at any time



starting with the date of filing the I-129 petition, through the prescribed document retention period discussed below. In fact, as with petitions filed under the FY 2021 Supplemental TFR, the Departments intend to select a significant number of petitions approved for audit examination to verify compliance with program requirements, including the irreparable harm standard and recruitment provisions implemented through this rule. Failure to provide evidence demonstrating irreparable harm or to comply with the audit process may be considered a substantial violation resulting in an adverse agency action on the employer, including revocation of the petition and/or TLC or program debarment. Similarly, failure to cooperate with any compliance review, evaluation, verification, or inspection conducted by DHS or DOL as required by 8 CFR 214.2(h)(6)(xi)(B)(2)(vi) and (vii), respectively, may constitute a violation of the terms and conditions of an approved petition and lead to petition revocation under 8 CFR 214.2(h)(11)(iii)(A)(3).

In addition to the statement regarding the irreparable harm standard, the attestation submitted to USCIS will also state that the employer meets all other eligibility criteria for the available visas, including the returning worker requirement, unless exempt because the H-2B worker is a national of one of the Northern Triangle countries or Haiti who is counted against the 6,500 visas reserved for such workers; will comply with all assurances, obligations, and conditions of employment set forth in the *Application for Temporary Employment Certification* (Form ETA 9142B and appendices) certified by DOL for the job opportunity (which serves as the TLC); will conduct additional recruitment of U.S. workers in accordance with the requirements of this rule and discussed further below; and will document and retain evidence of such compliance. Because the attestation will be submitted to USCIS as initial evidence with Form I-129, DHS considers the attestation to be evidence that is incorporated into and a part of the petition consistent with 8 CFR 103.2(b)(1). Accordingly, a petition may be denied or revoked, as applicable, based on or related to statements made in the attestation, including but not limited to the following grounds: (1) because the employer failed to demonstrate

employment of all of the requested workers is necessary under the appropriate business need standard; and (2) the employer failed to demonstrate that it requested and/or instructed that each worker petitioned for was a returning worker, or a national of one of the Northern Triangle countries or Haiti, as required by this rule. Any denial or revocation on such basis, however, would be appealable under 8 CFR part 103, consistent with DHS regulations and existing USCIS procedures.

It is the view of the Secretaries of Homeland Security and Labor that requiring a post-TLC attestation to USCIS is the most practical approach, given the time remaining in the first half of FY 2022 and the need to assemble the necessary documentation. In addition, the employer is required to retain documentation, which must be provided upon request by DHS or DOL, supporting the new attestations regarding (1) the irreparable harm standard, (2) the returning worker requirement, or, alternatively, documentation supporting that the H-2B worker(s) requested is a national of one of the Northern Triangle countries or Haiti who is counted against the 6,500 cap (which may be satisfied by the separate Form I-129 that employers are required to file for such workers in accordance with this rule) and (3) a recruitment report for any additional recruitment required under this rule for a period of 3 years. *See* new 20 CFR 655.69. Although the employer must have such documentation on hand at the time it files the petition, the Departments have determined that, if employers were required to submit the attestation form to DOL before filing a petition with DHS, the attendant delays would render any visas unlikely to satisfy the needs of American businesses given processing timeframes and the time remaining in this fiscal year. However, as noted above, the Departments will be conducting audits, investigations and/or post-adjudication compliance reviews on a significant number of H-2B petitions. As part of that process, USCIS may issue a request for additional evidence, a notice of intent to revoke, or a revocation notice, based on the review of such documentation, and DOL's OFLC and WHD will be able to review this documentation and enforce the

attestations during the course of an audit examination or investigation. *See* 8 CFR 103.2(b) or 8 CFR 214.2(h)(11).

In accordance with the attestation requirements, under which petitioners attest that they meet the irreparable harm standard, that they are seeking to employ only returning workers (unless exempt as described above), and they meet the document retention requirements at new 20 CFR 655.69, the petitioner must retain documents and records fulfilling their responsibility to demonstrate compliance with this rule for 3 years from the date of the attestation, and must provide the documents and records upon the request of DHS or DOL. With regard to the irreparable harm standard, employers attesting that they are suffering irreparable harm must be able to provide concrete evidence establishing severe and permanent financial loss that is occurring; the scope and severity of the harm must be clearly articulable. Employers attesting that they will suffer impending irreparable harm must be able to demonstrate that severe and permanent financial loss will occur in the near future without access to the supplemental visas; it will not be enough to provide evidence suggesting that such harm may or is likely to occur; rather, the documentary evidence must show that impending harm will occur and document the form of such harm. Supporting evidence may include, but is not limited to, the following types of documentation:

(1) Evidence that the business is suffering or will suffer in the near future permanent and severe financial loss due to the inability to meet financial or existing contractual obligations because they were unable to employ H-2B workers, including evidence of contracts, reservations, orders, or other business arrangements that have been or would be cancelled, and evidence demonstrating an inability to pay debts/bills;

(2) Evidence that the business is suffering or will suffer in the near future permanent and severe financial loss, as compared to prior years, such as financial statements (including profit/loss statements) comparing the employer's period of need to prior years; bank statements, tax returns, or other documents showing evidence of current and past financial condition; and

relevant tax records, employment records, or other similar documents showing hours worked and payroll comparisons from prior years to the current year;

(3) Evidence showing the number of workers needed in the previous three seasons (FY 2019, 2020, and 2021) to meet the employer's need as compared to those currently employed or expected to be employed at the beginning of the start date of need. Such evidence must indicate the dates of their employment, and their hours worked (for example, payroll records) and evidence showing the number of H-2B workers it claims are needed, and the workers' actual dates of employment and hours worked;

(4) Evidence that the petitioner is reliant on obtaining a certain number of workers to operate, based on the nature and size of the business, such as documentation showing the number of workers it has needed to maintain its operations in the past, or will in the near future need, including but not limited to: a detailed business plan, copies of purchase orders or other requests for good and services, or other reliable forecast of an impending need for workers; and/or

(5) With respect to satisfying the returning worker requirement, evidence that the employer requested and/or instructed that each of the workers petitioned by the employer in connection with this temporary rule were issued H-2B visas or otherwise granted H-2B status in FY 2019, 2020, or 2021, unless the H-2B worker is a national of one of the Northern Triangle countries or Haiti counted towards the 6,500 cap. Such evidence would include, but is not limited to, a date-stamped written communication from the employer to its agent(s) and/or recruiter(s) that instructs the agent(s) and/or recruiter(s) to only recruit and provide instruction regarding an application for an H-2B visa to those foreign workers who were previously issued an H-2B visa or granted H-2B status in FY 2019, 2020, or 2021.

These examples are not exhaustive, nor will they necessarily establish that the business meets the irreparable harm or returning worker standards; petitioners may retain other types of evidence they believe will satisfy these standards. When an approved petition is selected for audit examination or investigation, DHS or DOL will review all evidence available to it to

confirm that the petitioner properly attested to DHS, at the time of filing the petition, that their business was suffering irreparable harm or would suffer impending irreparable harm, and that they petitioned for and employed only returning workers, unless the H-2B worker is a national of one of the Northern Triangle countries or Haiti counted towards the 6,500 cap. If DHS subsequently finds that the evidence does not support the employer's attestations, DHS may deny or, if the petition has already been approved, revoke the petition at any time consistent with existing regulatory authorities. DHS may also, or alternatively, notify DOL. In addition, DOL may independently take enforcement action, including by, among other things, debarring the petitioner from the H-2B program for not less than 1 year or more than 5 years from the date of the final agency decision, which also disqualifies the debarred party from filing any labor certification applications or labor condition applications with DOL for the same period set forth in the final debarment decision. *See, e.g.*, 20 CFR 655.73; 29 CFR 503.20, 503.24.<sup>78</sup>

To the extent that evidence reflects a preference for hiring H-2B workers over U.S. workers, an investigation by additional agencies enforcing employment and labor laws, such as the Immigrant and Employee Rights Section (IER) of the Department of Justice's Civil Rights Division, may also be warranted. *See* INA section 274B, 8 U.S.C. 1324b (prohibiting certain types of employment discrimination based on citizenship status or national origin). Moreover, DHS and DOL may refer potential discrimination to IER pursuant to applicable interagency agreements. *See* IER, Partnerships, <https://www.justice.gov/crt/partnerships> (last visited Nov. 30, 2021). In addition, if members of the public have information that a participating employer may be abusing this program, DHS invites them to notify USCIS by completing the online fraud tip form, <https://www.uscis.gov/report-fraud/uscis-tip-form> (last visited Nov. 30, 2021).<sup>79</sup>

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<sup>78</sup> Pursuant to the statutory provisions governing enforcement of the H-2B program, INA section 214(c)(14), 8 U.S.C. 1184(c)(14), a violation exists under the H-2B program where there has been a willful misrepresentation of a material fact in the petition or a substantial failure to meet any of the terms and conditions of the petition. A substantial failure is a willful failure to comply that constitutes a significant deviation from the terms and conditions. *See, e.g.*, 29 CFR 503.19.

<sup>79</sup> DHS may publicly disclose information regarding the H-2B program consistent with applicable law and regulations. For information about DHS disclosure of information contained in a system of records, *see*

DHS, in exercising its statutory authority under INA section 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b), and section 105 of the FY 2021 Omnibus as extended by Public Law 117-70, is responsible for adjudicating eligibility for H-2B classification. As in all cases, the burden rests with the petitioner to establish eligibility by a preponderance of the evidence. INA section 291, 8 U.S.C. 1361. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Accordingly, as noted above, where the petition lacks initial evidence, such as a properly completed attestation, DHS may, as applicable, reject the petition in accordance with 8 CFR 103.2(a)(7)(ii) or deny the petition in accordance with 8 CFR 103.2(b)(8)(ii). Further, where the initial evidence submitted with the petition contains inconsistencies or is inconsistent with other evidence in the petition and the underlying TLC, DHS may issue a Request for Evidence, Notice of Intent to Deny, or Denial in accordance with 8 CFR 103.2(b)(8). In addition, where it is determined that an H-2B petition filed pursuant to the FY 2021 Omnibus as extended by Public Law 117-70 was granted erroneously, the H-2B petition approval may be revoked. *See* 8 CFR 214.2(h)(11).

Because of the particular circumstances of this regulation, and because the attestation and other requirements of this rule play a vital role in achieving the purposes of this rule, DHS and DOL intend that the attestation requirement, DOL procedures, and other aspects of this rule be non-severable from the remainder of the rule, including the increase in the numerical allocations.<sup>80</sup> Thus, in the event the attestation requirement or any other part of this rule is enjoined or held invalid, the remainder of the rule, with the exception of the retention requirements being codified in 20 CFR 655.69, is also intended to cease operation in the relevant jurisdiction, without prejudice to workers already present in the United States under this regulation, as consistent with law.

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<https://www.dhs.gov/system-records-notices-sorns>. Additional general information about DHS privacy policy generally can be accessed at <https://www.dhs.gov/policy>.

<sup>80</sup> The Departments' intentions with respect to non-severability extend to all features of this rule other than the portability provision, which is described in the section below.

## **F. Portability**

As an additional option for employers that cannot find U.S. workers, this rule allows petitioners to immediately employ certain H-2B workers who are present in the United States in H-2B status without waiting for approval of the H-2B petition. Such workers must be beneficiaries of a non-frivolous H-2B petition requesting an extension of stay received on or after the effective date of this temporary final rule but no later than 180 days after that date.<sup>81</sup> Additionally, petitioners may immediately employ individuals who are beneficiaries of a non-frivolous H-2B petition requesting an extension of the worker's stay that is pending as of the effective date of this temporary final rule without waiting for approval of the H-2B petition. Specifically, the rule allows H-2B nonimmigrant workers to begin employment with a new H-2B employer or agent upon USCIS's receipt of a timely filed, non-frivolous H-2B petition, provided the worker was lawfully admitted to the United States and has not worked without authorization subsequent to such lawful admission. Since every H-2B petition must be accompanied by an approved TLC, all H-2B petitioners must have completed a test of the U.S. labor market, as a result of which DOL determined that there were no qualified U.S. workers available to fill these temporary positions.

This provision is similar to the portability provision in the FY 2021 H-2B supplemental visa temporary final rule. In addition, the provision is similar to temporary flexibilities that DHS has used previously to improve employer access to noncitizen workers during the COVID-19 pandemic.<sup>82</sup> DHS recognizes the possibility that some beneficiaries were lawfully admitted and

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<sup>81</sup> Aliens who are the beneficiaries of petitions filed on the basis of 8 CFR 214.1(c)(4) are not eligible to port to a new employer under 8 CFR 214.2(h)(27).

<sup>82</sup> 86 FR 28198 (May 25, 2021). On May 14, 2020, DHS published a temporary final rule in the Federal Register to amend certain H-2B requirements to help H-2B petitioners seeking workers to perform temporary nonagricultural services or labor essential to the U.S. food supply chain. 85 FR 28843 (May 14, 2020). In addition, on April 20, 2020, DHS issued a temporary final rule which, among other flexibilities, allowed H-2A workers to change employers and begin work before USCIS approved the new H-2A petition for the new employer. 85 FR 21739. DHS has subsequently extended that portability provision for H-2A workers through two additional temporary final rules, on August 20, 2020, and December 18, 2020, which have been effective for H-2A petitions that were received on or after August 19, 2020 through December 17, 2020, and on or after December 18, 2020 through June 16, 2021, respectively. 85 FR 51304 and 85 FR 82291.

were in valid H-2B status at the time of the petition submission but such status may have lapsed during the pendency of the petition. Accordingly, DHS added the provision extending portability flexibility to petitioners to immediately employ beneficiaries of pending non-frivolous H-2B extension of stay petitions as of the effective date of this temporary final rule. *See* new 8 CFR 214.2(h)(27)(iii)(B). This provision is intended to mitigate the harm that petitioners may experience resulting from the COVID-19 pandemic by allowing petitioners to employ such H-2B workers so long as they were lawfully admitted to the United States and if they have not worked unlawfully after their admission. In the context of this rule, DHS believes this flexibility will help some U.S. employers address the challenges related to the limitations imposed by the cap, as well as due to the ongoing disruptions caused by the COVID-19 pandemic. The pandemic has resulted in a variety of travel restrictions and visa processing limitations to mitigate the spread of COVID-19.

In addition to resulting in a devastating loss of life, the worldwide pandemic of COVID-19 has impacted the United States in myriad ways, disrupting daily life, travel, and the operation of individual businesses and the economy at large. On January 31, 2020, the Secretary of the U.S. Department of Health and Human Services (HHS) declared a public health emergency dating back to January 27, 2020, under section 319 of the Public Health Service Act (42 U.S.C. 247d).<sup>83</sup> This determination that a public health emergency exists due to COVID-19 has subsequently been renewed seven times: on April 21, 2020, on July 23, 2020, on October 2, 2020, on January 7, 2021, on April 15, 2021, on July 19, 2021 and most recently on October 15, 2021, effective October 18, 2021.<sup>84</sup> On March 13, 2020, then-President Trump declared a National Emergency concerning the COVID-19 outbreak to control the spread of the virus in the United States.<sup>85</sup> The proclamation declared that the emergency began on March 1, 2020. DOS

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<sup>83</sup> HHS, *Determination of Public Health Emergency*, 85 FR 7316 (Feb. 7, 2020).

<sup>84</sup> *See* HHS Renewal of Determination That A Public Health Emergency Exists, <https://www.phe.gov/emergency/news/healthactions/phe/Pages/COVIDI-15Oct21.aspx> (Oct. 15, 2021).

<sup>85</sup> Proclamation 9994 of Mar. 13, 2020, *Declaring a National Emergency Concerning the Coronavirus Disease (COVID-19) Outbreak*, 85 FR 15337 (Mar. 18, 2020).



temporarily suspended routine immigrant and nonimmigrant visa services at all U.S. Embassies and Consulates on March 20, 2020, and subsequently announced a phased resumption of visa services in which it would continue to provide emergency and mission critical visa services and resume routine visa services as local conditions and resources allowed.<sup>86</sup> Based on the importance of the H-2A temporary agricultural worker and H-2B temporary nonagricultural worker programs, DOS indicated it would continue processing H-2A and H-2B cases to the extent possible, as permitted by post resources and local government restrictions, and expanded the categories of H-2 visa applicants whose applications can be adjudicated without an in-person interview.<sup>87</sup> Although routine visa services have resumed<sup>88</sup> subject to local conditions and restrictions, and DOS has expanded visa interview waiver eligibility,<sup>89</sup> the COVID-19 pandemic continues to have a significant impact on visa processing at embassies and consulates around the world.<sup>90</sup> And as noted above, growing concern about the COVID Omicron variant recently prompted tightened testing requirements for international air travel to the United States, which may have an impact on such travel.

Further, due to the possibility that some H-2B workers may be unavailable due to travel restrictions, to include those intended to limit the spread of COVID-19, or visa processing delays or may become unavailable due to COVID-19 related illness, U.S. employers that have approved H-2B petitions or who will be filing H-2B petitions in accordance with this rule might not receive all of the workers requested to fill the temporary positions.

DHS is strongly committed not only to protecting U.S. workers and helping U.S. businesses receive the documented workers authorized to perform temporary nonagricultural

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<sup>86</sup> DOS, *Suspension of Routine Visa Services*, <https://travel.state.gov/content/travel/en/News/visas-news/suspension-of-routine-visa-services.html> (last updated July 22, 2020).

<sup>87</sup> DOS, *Important Announcement on Waivers of the Interview Requirement for Certain Nonimmigrant Visas*, <https://travel.state.gov/content/travel/en/News/visas-news/important-announcement-on-waivers-of-the-interview-requirement-for-certain-nonimmigrant-visas.html> (last updated Dec. 23, 2021).

<sup>88</sup> DOS, *Visa Services Operating Status Update*, <https://travel.state.gov/content/travel/en/News/visas-news/visa-services-operating-status-update.html> (last updated Nov. 19, 2021).

<sup>89</sup> DOS, *Expansion of Interview Waiver Eligibility*, <https://travel.state.gov/content/travel/en/News/visas-news/expansion-of-interview-waiver-eligibility.html> (last updated Mar. 11, 2021).

<sup>90</sup> Celia Belin, *Travel is resuming, but not for everyone*, Brookings, <https://www.brookings.edu/blog/order-from-chaos/2021/11/08/travel-is-resuming-but-not-for-everyone/> (Nov. 8, 2021).

services or labor that they need, but also to protecting the rights and interests of H-2B workers (consistent with Executive Order 13563 and in particular its reference to “equity,” “fairness,” and “human dignity”). In the FY 2020 DHS Further Consolidated Appropriations Act (Public Law 116-94), Congress directed DHS to provide options to improve the H-2A and H-2B visa programs, to include options that would protect worker rights.<sup>91</sup> DHS has determined that providing H-2B nonimmigrant workers with the flexibility of being able to begin work with a new H-2B petitioner immediately and avoid a potential job loss or loss of income while the new H-2B petition is pending, provides some certainty to H-2B workers who may have found themselves in situations that warrant a change in employers.<sup>92</sup> Providing that flexibility is also equitable and fair.

Portability for H-2B workers provides these noncitizens with the option of not having to worry about job loss or loss of income between the time they leave a current employer and while they await approved employment with a new U.S. employer or agent. DHS believes this flexibility (job portability) not only protects H-2B workers but also provides an alternative to H-2B petitioners who have not been able to find U.S. workers and who have not been able to obtain H-2B workers subject to the statutory or supplemental caps who have the skills to perform the job duties. In that sense as well, it is equitable and fair.

DHS is making this flexibility available for a 180-day period in order to provide stability for H-2B employers amidst continuing uncertainties surrounding the COVID-19 pandemic. This

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<sup>91</sup> The Joint Explanatory Statement accompanying the *Fiscal Year (FY) 2020 Department of Homeland Security (DHS) Further Consolidated Appropriations Act* (Public Law 116-94) states, “Not later than 120 days after the date of enactment of this Act, DHS, the Department of Labor, the Department of State, and the United States Digital Service are directed to report on options to improve the execution of the H-2A and H-2B visa programs, including: processing efficiencies; combatting human trafficking; protecting worker rights; and reducing employer burden, to include the disadvantages imposed on such employers due to the current semiannual distribution of H-2B visas on October 1 and April 1 of each fiscal year. USCIS is encouraged to leverage prior year materials relating to the issuance of additional H-2B visas, to include previous temporary final rules, to improve processing efficiencies.”

<sup>92</sup> The White House, *The National Action Plan to Combat Human Trafficking*, Priority Action 1.5.3, at p. 25 (Dec 2021); The White House, *The National Action Plan to Combat Human Trafficking*, Priority Action 1.6.3, at p. 20-21 (2020) (Stating that “[w]orkers sometimes find themselves in abusive work situations, but because their immigration status is dependent on continued employment with the employer in whose name the visa has been issued, workers may be left with few options to leave that situation.”) By providing the option of changing employers without risking job loss or a loss of income through the publication of this rule, DHS believes that H-2B workers may be more likely to leave abusive work situations, and thereby are afforded greater worker protections.

period is justified especially given the possible future impacts of COVID-19 variants and uncertainty regarding the duration of vaccine-gained immunity and how effective currently approved vaccines will be in responding to future COVID-19 variants.<sup>93</sup> DHS will continue to monitor the evolving health crisis caused by COVID-19 and may address it in future rules.

#### **G. COVID-19 Worker Protections**

It is the policy of DHS and its Federal partners to support equal access to the COVID-19 vaccines and vaccine distribution sites, irrespective of an individuals' immigration status.<sup>94</sup> This policy promotes fairness and equity (see Executive Order 13563). Accordingly, DHS and DOL encourage all individuals, regardless of their immigration status, to receive the COVID-19 vaccine. U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection do not conduct enforcement operations at or near vaccine distribution sites or clinics. Consistent with ICE's protected areas policy, ICE does not and will not carry out enforcement operations in or near a medical or mental healthcare facility, such as a hospital, doctor's office, health clinic, vaccination or testing site, urgent care center, site that serves pregnant individuals, or community health center.<sup>95</sup>

This TFR reflects that policy by providing as follows:

Supplemental H-2B Visas: With respect to petitioners who wish to qualify to receive supplemental H-2B visas pursuant to the FY 2021 Omnibus as extended by Public Law 117-70, the Departments are using the DOL Form ETA-9142-B-CAA-5 to support equal access to vaccines in two ways. First, the Departments are requiring such petitioners to attest on the DOL Form ETA-9142-B-CAA-5 that, consistent with such petitioners' obligations under generally

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<sup>93</sup> See CDC, What You Need to Know about Variants, <https://www.cdc.gov/coronavirus/2019-ncov/variants/variant.html> (last updated Dec. 13, 2021); CDC, Key Things to Know About COVID-19 Vaccines, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html> (last updated Jan. 12, 2022).

<sup>94</sup> See DHS, Statement on Equal Access to COVID-19 Vaccines and Vaccine Distribution Sites, <https://www.dhs.gov/news/2021/02/01/dhs-statement-equal-access-covid-19-vaccines-and-vaccine-distribution-sites> (Feb. 1, 2021) (last accessed Nov. 30, 2021).

<sup>95</sup> See ICE, FAQs: Protected Areas and Courthouse Arrests, <https://www.ice.gov/about-ice/ero/protected-areas> (last visited Jan. 11, 2022).

applicable H-2B regulations, they will comply with all Federal, State, and local employment-related laws and regulations, including, where applicable, health and safety laws and laws related to COVID-19 worker protections; any right to time off or paid time off for COVID-19 vaccination, or to reimbursement for travel to and from the nearest available vaccination site. *See* new 8 CFR 214.2(h)(6)(xi)(B)(2)(iv) and 20 CFR 655.64(a)(4). Second, the Departments are requiring such petitioners to also attest that they will notify any H-2B workers approved under the supplemental cap, in a language understood by the worker as necessary or reasonable, that all persons in the United States, including nonimmigrants, have equal access to COVID-19 vaccines and vaccine distribution sites. WHD has published a poster for employers' optional use for this notification.<sup>96</sup> Because the attestation will be submitted to USCIS as initial evidence with Form I-129, DHS considers the attestation to be evidence that is incorporated into and a part of the petition consistent with 8 CFR 103.2(b)(1). Accordingly, a petition may be denied or revoked, as applicable, based on or related to statements made in the attestation, including, but not limited to, because the employer violated an applicable employment-related law or regulation, or failed to notify workers regarding equal access to COVID-19 vaccines and vaccine distribution sites.

Other H-2B Employers: While there is no additional attestation with respect to H-2B petitioners that do not avail themselves of the supplemental H-2B visas made available under this rule, the Departments remind all H-2B employers that they must comply with all Federal, State, and local employment-related laws and regulations, including, where applicable, health and safety laws and laws related to COVID-19 worker protections; any right to time off or paid time off for COVID-19 vaccination, or to reimbursement for travel to and from the nearest available vaccination site. Failure to comply with such laws and regulations would be contrary to the attestation 7 on ETA 9142B – Appendix B, and therefore may be a basis for DHS to revoke the

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<sup>96</sup>See, *Employee Rights - H-2B Workers and COVID-19*  
[https://www.dol.gov/sites/dolgov/files/WHD/posters/H2B\\_COVID.pdf](https://www.dol.gov/sites/dolgov/files/WHD/posters/H2B_COVID.pdf) (English);  
[https://www.dol.gov/sites/dolgov/files/WHD/posters/H2B\\_COVID\\_SPA.pdf](https://www.dol.gov/sites/dolgov/files/WHD/posters/H2B_COVID_SPA.pdf) (Spanish) (Last visited Dec. 22, 2021).

petition under 8 CFR 214.2(h)(11)(iii)(A)(3) for violating terms and conditions of the approved petition.<sup>97</sup> This obligation is also reflected as a condition of H-2B portability under this rule. *See new 8 CFR 214.2(h)(27)(iii)(C).*

President Biden, in his speech to Joint Session of Congress on April 21, 2021, made the following statement: “[T]oday, I’m announcing a program to address [the issue of COVID vaccinations]... nationwide. I’m calling on every employer, large and small, in every state, to give employees the time off they need, with pay, to get vaccinated and any time they need, with pay, to recover if they are feeling under the weather after the shot.”<sup>98</sup> More recently, President Biden reiterated his call on employers to provide paid time off to their employees to get booster shots.<sup>99</sup> Consistent with the President’s statements, the Departments strongly urge, but do not require, that all employers seeking H-2B workers under either the Supplemental Cap or portability sections of the TFR, make every effort to ensure that all their workers, including nonimmigrant workers, be afforded an opportunity to take the time off needed to receive their COVID-19 vaccinations, as well as time off, with pay, to recover from any temporary side effect. In Proclamation 10294 of October 25, 2021, the President barred the entry of nonimmigrants into the United States via air transportation unless they are fully vaccinated against COVID-19, with certain exceptions.<sup>100</sup> On January 22, 2022, similar requirements entered into force at land ports of entry and ferry terminals.<sup>101</sup> The Departments therefore expect that H-2B nonimmigrants who enter the United States via air transportation under this rule will generally be fully vaccinated

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<sup>97</sup> During the period of employment specified on the Temporary Labor Certification, the employer must comply with all applicable Federal, State and local employment-related laws and regulations, including health and safety laws. 20 CFR 655.20(z). By submitting the Temporary Labor Certification as evidence supporting the petition, it is incorporated into and considered part of the benefit request under 8 CFR 103.2(b)(1).

<sup>98</sup> *See* <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/04/21/remarks-by-president-biden-on-the-covid-19-response-and-the-state-of-vaccinations-2/> (April 21, 2021).

<sup>99</sup> *See* <https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/02/fact-sheet-president-biden-announces-new-actions-to-protect-americans-against-the-delta-and-omicron-variants-as-we-battle-covid-19-this-winter/> (December 2, 2021).

<sup>100</sup> *See* 86 FR 59603 (Oct. 28, 2021) (Presidential Proclamation); *see also* 86 FR 61224 (Nov. 5, 2021) (implementing CDC Order).

<sup>101</sup> *See* 87 FR 3425 (Jan. 24, 2022) (restrictions at United States-Mexico border); 87 FR 3429 (Jan. 24, 2022) (restrictions at United States-Canada border).

against COVID-19. The Departments note, however, that some H-2B nonimmigrants (such as nonimmigrants who are already in the United States) may not yet be vaccinated or may nonetheless be eligible for booster shots.

As noted, Executive Order 13563 refers to fairness, equity, and human dignity, and such efforts, on the part of employers, would be consistent with those commitments.

Petitioners otherwise are strongly encouraged to facilitate and provide flexibilities, to the greatest extent possible, to all workers who wish to receive COVID-19 vaccinations.

## **H. DHS Petition Procedures**

To petition for H-2B workers under this rule, the petitioner must file a Form I-129 in accordance with applicable regulations and form instructions, an unexpired TLC, and the attestation form described above. All H-2B petitions must state the nationality of all the requested H-2B workers, whether named or unnamed, even if there are beneficiaries from more than one country. *See* 8 CFR 214.2(h)(2)(iii). If filing multiple Forms I-129 based on the same TLC (for instance, one requesting returning workers and another requesting workers who are nationals of one of the Northern Triangle countries or Haiti), each H-2B petition must include a copy of the TLC and reference all previously-filed or concurrently filed petitions associated with the same TLC. The total number of requested workers may not exceed the total number of workers indicated on the approved TLC. Petitioners seeking H-2B classification for nationals of the Northern Triangle countries or Haiti under the 6,500 visa allocation that are exempt from the returning worker provision must file a separate Form I-129 for those nationals of the Northern Triangle countries and Haiti only. *See new* 8 CFR 214.2(h)(6)(xi). In this regard, a petition must be filed with a single Form ETA-9142-B-CAA-5 that clearly indicates that the petitioner is only requesting nationals from a Northern Triangle country or Haiti who are exempt from the returning worker requirement. Specifically, if the petitioner checks Box #5 of Form ETA-9142-B-CAA-5, then the petition accompanying that form *must* be filed only on behalf of nationals of

one or more of the Northern Triangle countries or Haiti, and not other countries. In such a case if the Form I-129 petition is requesting beneficiaries from countries other than Northern Triangle countries or Haiti, then USCIS may reject, issue a request for evidence, notice of intent to deny, or denial, or, in the case of a non-frivolous petition, a partial approval limiting the petition to the number of beneficiaries who are from one of the Northern Triangle countries or Haiti. Requiring the filing of separate petitions to request returning workers and to request workers who are nationals of the Northern Triangle countries or Haiti is necessary to ensure the operational capability to properly calculate and manage the respective additional cap allocations and to ensure that all corresponding visa issuances are limited to qualifying applicants, particularly when such petitions request unnamed beneficiaries or are relied upon for subsequent requests to substitute beneficiaries in accordance with 8 CFR 214.2(h)(6)(viii). The attestations must be filed on Form ETA-9142-B-CAA-5, Attestation for Employers Seeking to Employ H-2B Nonimmigrant Workers Under Section 105 of Division O of the Further Consolidated Appropriations Act, 2021 Public Law 116-260, and Public Laws 117-43 and 117-70. *See* 20 CFR 655.64. Petitioners are required to retain a copy of such attestations and all supporting evidence for 3 years from the date the associated TLC was approved, consistent with 20 CFR 655.56 and 29 CFR 503.17. *See* new 20 CFR 655.69. Petitions submitted to DHS pursuant to the FY 2021 Omnibus, as extended by Public law 117-43 and Public Law 117-70, will be processed in the order in which they were received, and pursuant to processes in place for when numerical limitations are reached under INA section 214(g)(1)(B) or (g)(10), 8 U.S.C. 1184(g)(1)(B) or (g)(10).

Consistent with the intent of this rule to address urgent demand from employers for H-2B workers with start dates in the first half of the fiscal year, USCIS will not accept petitions received after March 31, 2022. *See* new 8 CFR 214.2(h)(6)(xi)(C). Such petitions will be rejected and the filing fees will be returned. DHS believes it is appropriate to set a final filing date that aligns with the final employment start date allowed under this rule, as petitioners under

the supplemental allocation will attest to a need for H-2B workers to start on or before March 31, 2022, without whom they are suffering irreparable harm or will suffer impending irreparable harm.<sup>102</sup>

Based on the time-limited authority granted to DHS by Public law 117-43 and Public Law 117-70, on the same terms as section 105 of the under the FY 2021 Omnibus, DHS is notifying the public that petitions seeking a visa under this rule filed on or before March 31, 2022, may not be approved by USCIS on or after October 1, 2022. *See* new 8 CFR 214.2(h)(6)(xi). Petitions pending with USCIS that are not approved before October 1, 2022 will be denied and any fees will not be refunded. *See* new 8 CFR 214.2(h)(6)(xi).

Petitioners may choose to request premium processing of their petitions under 8 CFR 103.7(e), which allows for expedited processing for an additional fee.

## **I. DOL Procedures**

As noted above, all employers are required to have an approved and valid TLC from DOL in order to file a Form I-129 petition with DHS. *See* 8 CFR 214.2(h)(6)(iv)(A) and (D). The standards and procedures governing the submission and processing of *Applications for Temporary Employment Certification* for employers seeking to hire H-2B workers are set forth in 20 CFR part 655, subpart A. An employer that seeks to hire H-2B workers must request a TLC in compliance with the application filing requirements set forth in 20 CFR 655.15 and meet all the requirements of 20 CFR part 655, subpart A, to obtain a valid TLC, including the criteria for certification set forth in 20 CFR 655.51. *See* 20 CFR 655.64(a) and 655.50(b). Employers with an approved TLC have conducted recruitment, as set forth in 20 CFR 655.40 through 655.48, to determine whether U.S. workers are qualified and available to perform the work for which H-2B workers are sought.

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<sup>102</sup> Conversely, DHS believes that allowing petitioners to file these petitions during the second half of the fiscal year would be inconsistent with the intent to address the already-exceeded first half demand for H-2B workers without whom employers would be suffering irreparable harm. Allowing petitioners to file so far after their start date of need could call into question the petitioner's period of temporary need for the services or labor to be performed, as well as petitioners' attestations regarding the irreparable harm they are suffering or the impending irreparable harm they stand to suffer without the ability to employ all of the requested workers for that period of need.



The H-2B regulations require that, among other things, an employer seeking to hire H-2B workers in a non-emergency situation must file a completed *Application for Temporary Employment Certification* with the National Processing Center (NPC) designated by the OFLC Administrator no more than 90 calendar days and no fewer than 75 calendar days before the employer's date of need (i.e., start date for the work). *See* 20 CFR 655.15.

Under 20 CFR 655.17, an employer may request a waiver of the time period(s) for filing an *Application for Temporary Employment Certification* based on “good and substantial” cause, provided that the employer has sufficient time to thoroughly test the domestic labor market on an expedited basis and the OFLC certifying officer (CO) has sufficient time to make a final determination as required by the regulation. To rely on this provision, as the Departments explained in the 2015 H-2B Interim Final Rule,<sup>103</sup> the employer must provide the OFLC CO with detailed information describing the “good and substantial cause” necessitating the waiver. Such cause may include the substantial loss of U.S. workers due to Acts of God, or a similar unforeseeable human-made catastrophic event that is wholly outside the employer's control, unforeseeable changes in market conditions, or pandemic health issues. Thus, to ensure an adequate test of the domestic labor market and to protect the integrity of the H-2B program, the Departments clearly intended that use of emergency procedures must be narrowly construed and permitted in extraordinary and unforeseeable catastrophic circumstances that have a direct impact on the employer's need for the specific services or labor to be performed. Even under the existing H-2B statutory visa cap structure, DOL considers USCIS' announcement(s) that the statutory cap(s) on H-2B visas has been reached, which may occur with regularity every six months depending on H-2B visa need, as foreseeable, and therefore not within the meaning of “good and substantial cause” that would justify a request for emergency procedures.<sup>104</sup>

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<sup>103</sup> Interim Final Rule, *Temporary Non-Agricultural Employment of H-2B Aliens in the United States*, 80 FR 24041 (Apr. 29, 2015) (2015 H-2B Interim Final Rule).

<sup>104</sup> *See* U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, 2015 H-2B Interim Final Rule FAQs, *Round 12: Job Order and Application Filing and Processing, Emergency Procedures and Post-Certification Amendments*. Retrieved December 18, 2021, from [https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2B\\_2015\\_IFR\\_FAQs\\_Round12.pdf](https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2B_2015_IFR_FAQs_Round12.pdf)

Accordingly, employers cannot rely solely on the supplemental H-2B visas made available through this rule as good and substantial cause to use emergency procedures under 20 CFR 655.17.

In addition to the recruitment already conducted in connection with a valid TLC, in order to ensure the recruitment has not become stale, employers that wish to obtain visas for their workers under 8 CFR 214.2(h)(6)(xi), and who file an I-129 petition 45 or more days after the certified start date of work on the TLC must conduct additional recruitment for U.S. workers. This is particularly important as U.S. workers continue to reenter the workforce as they become vaccinated. As noted in the 2015 H-2B Interim Final Rule, U.S. workers seeking employment in temporary or seasonal nonagricultural jobs typically do not search for work months in advance, and cannot make commitments about their availability for employment far in advance of the work start date. *See* 80 FR 24041, 24061, 24071. Given that the temporary labor certification process generally begins 75 to 90 days in advance of the employer's start date of work, employer recruitment efforts typically occur between 40 and 60 days before that date with an obligation to provide employment to any qualified U.S. worker who applies until 21 days before the date of need. Therefore, employers with TLCs containing a start date of work on October 1, 2021, likely conducted their positive recruitment beginning around late-July and ending around mid-August 2021, and continued to consider U.S. worker applicants and referrals only until September 10, 2021.

In order to provide U.S. workers a realistic opportunity to pursue jobs for which employers will be seeking foreign workers under this rule, the Departments have determined that if employers file an I-129 petition 45 or more days after their dates of need, they have not conducted recruitment recently enough for the DOL to reasonably conclude that there are currently an insufficient number of U.S. workers who are qualified, willing, and available to perform the work absent taking additional, positive recruitment steps. The 45-day threshold for additional recruitment identified in this rule reflects a timeframe between the end of the

employer's recruitment and filing of the petition similar to that provided under the FY 2018, FY 2019, and FY 2021 H-2B supplemental cap rules.

An employer that files an I-129 petition under 8 CFR 214.2(h)(6)(xi) fewer than 45 days after the certified start date of work on the TLC must submit the TLC and a completed Form ETA-9142B-CAA-5, but is not required to conduct recruitment for U.S. workers beyond the recruitment already conducted as a condition of certification. Only those employers with still-valid TLCs with a start date of work that is 45 or more days before the date they file a petition will be required to conduct recruitment in addition to that conducted prior to being granted labor certification and attest that the recruitment will be conducted, as follows.

Employers that are required to engage in new recruitment must place a new job order for the job opportunity with the State Workforce Agency (SWA) serving the area of intended employment no later than the next business day after submitting an I-129 petition for H-2B workers to USCIS, and inform the SWA that the job order is being placed in connection with a previously submitted and certified *Application for Temporary Employment Certification* for H-2B workers by providing the SWA with the unique OFLC TLC case number.

The job order must contain the job assurances and contents set forth in 20 CFR 655.18 for recruitment of U.S. workers at the place of employment, and remain posted for at least 15 calendar days. The employer must also follow all applicable SWA instructions for posting job orders and receive applications in all forms allowed by the SWA, including online applications. The Departments have concluded that keeping the job order posted for a period of 15 calendar days, during the period the employer is conducting the additional recruitment steps explained below, will effectively ensure U.S. workers are apprised of the job opportunity and are referred for employment, if they are willing, qualified, and available to perform the work. The 15 calendar day period also is consistent with the employer-conducted recruitment activity period applicable under 20 CFR 655.40(b).

Once the SWA places the new job order on its public labor exchange system, the SWA will perform its normal employment service activities by circulating the job order for intrastate clearance, and in interstate clearance by providing a copy of the job order to other SWAs with jurisdiction over listed worksites as well as those States the OFLC CO designated in the original Notice of Acceptance issued under 20 CFR 655.33. Where the occupation or industry is traditionally or customarily unionized, the SWA will also circulate a copy of the new job order to the central office of the State Federation of Labor in the State(s) in which work will be performed, and the office(s) of local union(s) representing workers in the same or substantially equivalent job classification in the area(s) in which work will be performed, consistent with its current obligation under 20 CFR 655.33(b)(5). Common H-2B occupations or industries that are traditionally or customarily unionized include, but are not limited to, those covering construction and extraction, manufacturing, food and hospitality, transportation and distribution, and other production related services. To facilitate an effective dissemination of these job opportunities, DOL encourages union(s) or hiring halls representing workers in occupations typically used in the H-2B program to proactively contact and establish partnerships with SWAs in order to obtain timely information on available temporary job opportunities. This will aid the SWAs' prompt and effective outreach under the rule. DOL's OFLC maintains a comprehensive directory of contact information for each SWA at <https://www.dol.gov/agencies/eta/foreign-labor/contact>.

The employer also must conduct additional recruitment steps during the period of time the SWA is actively circulating the job order for intrastate clearance. First, the employer must contact, by email or other electronic means, the nearest American Job Center(s) (AJC) serving the area of intended employment where work will commence to request staff assistance to advertise and recruit U.S. workers for the job opportunity. AJCs bring together a variety of programs providing a wide range of employment and training services for U.S. workers, including job search services and assistance for prospective workers and recruitment services for employers through the Wagner-Peyser Program. Therefore, AJCs can offer assistance to

employers with recruitment of U.S. workers, and contact with local AJCs will facilitate contemporaneous and effective recruitment activities that can broaden dissemination of the employer's job opportunity through connections with other partner programs within the One-Stop System to locate qualified U.S. workers to fill the employer's labor need. For example, the local AJC, working in concert with the SWA, can coordinate efforts to contact community-based organizations in the geographic area that serve potentially qualified workers or, when a job opportunity is in an occupation or industry that is traditionally or customarily unionized, the local AJC may be better positioned to identify and circulate the job order to appropriate local union(s) or hiring hall(s), consistent with 20 CFR 655.33(b)(5). In addition, as a partner program in the One-Stop System, AJCs are connected with the State's unemployment insurance program, thus an employer's connection with the AJC will help facilitate knowledge of the job opportunity to U.S. workers actively seeking employment. When contacting the AJC(s), the employer must provide staff with the job order number or, if the job order number is unavailable, a copy of the job order.

To increase navigability and to make the process as convenient as possible, DOL offers an online service for employers to locate the nearest local AJC at <https://www.careeronestop.org/> and by selecting the "Find Local Help" feature on the main homepage. This feature will navigate the employer to a search function called "Find an American Job Center" where the city, state or zip code covering the geographic area where work will commence can be entered. Once entered and the search function is executed, the online service will return a listing of the name(s) of the AJC(s) serving that geographic area as well as a contact option(s) and an indication as to whether the AJC is a "comprehensive" or "affiliate" center. Employers must contact the nearest "comprehensive" AJC serving the area of intended employment where work will commence or, where a "comprehensive" AJC is not available, the nearest "affiliate" AJC. A "comprehensive" AJC tends to be a large office that offers the full range of employment and business services, and an "affiliate" AJC typically is a smaller office that offers a self-service career center, conducts

hiring events, and provides workshops or other select employment services for workers.

Because a “comprehensive” AJC may not be available in many geographic areas, particularly among rural communities, this rule permits employers to contact the nearest “affiliate” AJC serving the area of intended employment where a “comprehensive” AJC is not available. As explained on the locator website, some AJCs may continue to offer virtual or remote services due to the pandemic with physical office locations temporarily closed for in-person and mail processing services. Therefore, this rule requires that employers utilize available electronic methods for the nearest AJC to meet the contact and disclosure requirements in this rule.

Second, during the period of time the SWA is actively circulating the job order described in paragraph (a)(5)(i) for intrastate clearance, the employer must make reasonable efforts to contact (by mail or other effective means) its former U.S. workers that it employed in the occupation at the place of employment (except those who were dismissed for cause or who abandoned the worksite) during the period beginning January 1, 2020, until the date the I-129 petition required under 8 CFR 214.2(h)(6)(xi) is submitted. Among the employees the employer must contact are those who have been furloughed or laid off during this period. The employer must disclose to its former employees the terms of the job order, and solicit their return to the job. The contact and disclosures required by this paragraph must be provided in a language understood by the worker, as necessary or reasonable.

Furloughed employees are employees the employer laid off (as the term is defined in 20 CFR 655.5 and 29 CFR 503.4), but the layoff is intended to last for a temporary period of time. This recruitment step will help ensure notice of the job opportunity is disseminated broadly to U.S. workers who were laid off or furloughed during the COVID-19 outbreak and who may be seeking employment as the economy continues to recover and as more people are vaccinated. While this requirement goes beyond the requirement at 20 CFR 655.43, the Departments believe it is appropriate given the evolving conditions of the U.S. labor market, as described above, and

the increased likelihood that qualified U.S. workers will make themselves available for these job opportunities.

Third, as the employer was required to do when initially applying for its labor certification, the employer must provide a copy of the job order to the bargaining representative for its employees in the occupation and area of intended employment, consistent with 20 CFR 655.45(a), or if there is no bargaining representative, post the job order in the places and manner described in 20 CFR 655.45(b).

The requirements to contact former U.S. workers and provide notice to the bargaining representative or post the job order must be conducted in a language understood by the workers, as necessary or reasonable. This requirement would apply, for example, in situations where an employer has one or more employees who do not speak English as their primary language and who have a limited ability to read, write, speak, or understand English. This requirement would allow those workers to make informed decisions regarding the job opportunity, and is a reasonable interpretation of the recruitment requirements in 20 CFR part 655, subpart A, in light of the need to ensure that the test of the U.S. labor market is as comprehensive as possible. Consistent with existing language requirements in the H-2B program under 20 CFR 655.20(l), DOL intends to broadly interpret the necessary or reasonable qualification, and apply an exemption only in those situations where having the job order translated into a particular language would both place an undue burden on an employer and not significantly disadvantage the employee.

The employer must hire any qualified U.S. worker who applies or is referred for the job opportunity until either (1) the date on which the last H-2B worker departs for the place of employment, or (2) 30 days after the last date on which the SWA job order is posted, whichever is later. Additionally, consistent with 20 CFR 655.40(a), applicants may be rejected only for lawful job-related reasons. Given that the employer, SWA, and AJC(s) will be actively engaged in conducting recruitment and broader dissemination of the job opportunity during the period of

time the job order is active, this requirement provides an adequate period of time for U.S. workers to contact the employer or SWA for referral to the employer and completion of the additional recruitment steps described above. As explained above, the Departments have determined that if employers file a petition 45 or more days after their dates of need, they have not conducted recruitment recently enough for the Departments to reasonably conclude that there are currently an insufficient number of U.S. workers qualified, willing, and available to perform the work absent additional recruitment.

Because of the abbreviated timeline for the additional recruitment required for employers whose initial recruitment has gone stale, the Departments have determined that a longer hiring period is necessary to approximate the hiring period under normal recruitment procedures and ensure that domestic workers have access to these job opportunities, consistent with the Departments' mandate. Additionally, given the relatively brief period during which additional recruitment will occur, additional time may be necessary for U.S. workers to have a meaningful opportunity to learn about the job opportunities and submit applications.

The Departments remind all H-2B employers of the requirement to engage in non-discriminatory hiring practices and that the job opportunity is, and through the recruitment period set forth in this rule must continue to be, open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, disability, or citizenship, as specified under 20 CFR 655.20(r). Further, employers that wish to require interviews must conduct those interviews by phone or provide a procedure for the interviews to be conducted in the location where the worker is being recruited so that the worker incurs little or no cost. Employers cannot provide potential H-2B workers with more favorable treatment with respect to the requirement for, and conduct of, interviews. *See* 20 CFR 655.40(d).

Any U.S. worker who applies or is referred for the job opportunity and is not considered by the employer for the job opportunity, experiences difficulty accessing or understanding the materials terms and conditions of the job opportunity, or believes they have been improperly



rejected by the employer may file a complaint directly with the SWA serving the area of intended employment. Each SWA maintains a complaint system for public labor exchange services established under 20 CFR part 658, subpart E, and any complaint filed by, or on behalf of, a U.S. worker about a specific H-2B job order will be processed under this existing complaint system. Depending on the circumstances, the SWA may seek informal resolution by working with the complainant and the employer to resolve, for example, miscommunications with the employer to be considered for the job opportunity or other concerns or misunderstandings related to the terms and conditions of the job opportunity. In other circumstances, such as allegations involving discriminatory hiring practices, the SWA may need to formally enter the complaint and refer the matter to an appropriate enforcement agency for prompt action. As mentioned above, DOL's OFLC maintains a comprehensive directory of contact information for each SWA that can be used to obtain more information on how to file a complaint.

Although the hiring period may require some employers to hire U.S. workers after the start of the contract period, this is not unprecedented. For example, in the H-2A program, employers have been required to hire U.S. workers through 50 percent of the contract period since at least 2010,<sup>105</sup> which “enhance[s] protections for U.S. workers, to the maximum extent possible, while balancing the potential costs to employers,” and is consistent with the Departments’ responsibility to ensure that these job opportunities are available to U.S. workers.<sup>106</sup> The Department acknowledges that hiring workers after the start of the contract period imposes an additional cost on employers, but that cost can be lessened, in part, by the ability to discharge the H-2B worker upon hiring a U.S. worker (note, however, that an employer must pay for any discharged H-2B worker’s return transportation, 20 CFR 655.20(j)(1)(ii) and 29 CFR 503.16(j)(1)(ii)). Additionally, this rule permits employers to immediately hire H-2B

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<sup>105</sup> Final Rule, *Temporary Agricultural Employment of H-2A Aliens in the United States*, 75 FR 6884, 6921 (Feb. 12, 2010).

<sup>106</sup> NPRM, *Temporary Agricultural Employment of H-2A Aliens in the United States*, 74 FR 45906, 45917 (Sept. 4, 2009); 75 FR at 6922.

workers who are already present in the United States without waiting for approval of an H-2B petition, which will reduce the potential for harm to H-2B workers as a result of displacement by U.S. workers. *See* new 8 CFR 214.2(h)(27). Most importantly, a longer hiring period will ensure that available U.S. workers have a viable opportunity to apply for H-2B job opportunities. Accordingly, the Departments have determined that in affording the benefits of this temporary cap increase to businesses that are suffering irreparable harm or will suffer impending irreparable harm, it is necessary to ensure U.S. workers who may be seeking employment as the economy continues to recover in 2022 have sufficient time to apply for these jobs.

As in the temporary rules implementing the supplemental cap increases in prior years, employers must retain documentation demonstrating compliance with the recruitment requirements described above, including placement of a new job order with the SWA, contact with AJCs, contact with former U.S. workers, and compliance with § 655.45(a) or (b). Employers must prepare and retain a recruitment report that describes these efforts and meets the requirements set forth in 20 CFR 655.48, including the requirement to update the recruitment report throughout the recruitment and hiring period set forth in paragraph (a)(5)(v) of new 20 CFR 655.64. Employers must maintain copies of the recruitment report, attestation, and supporting documentation, as described above, for a period of 3 years from the date that the TLC was approved, consistent with the document retention requirements under 20 CFR 655.56. These requirements are similar to those that apply to certain seafood employers that stagger the entry of H-2B workers under 20 CFR 655.15(f).

DOL's WHD has the authority to investigate the employer's attestations, as the attestations are a required part of the H-2B petition process under this rule and the attestations rely on the employer's existing, approved TLC. Where a WHD investigation determines that there has been a willful misrepresentation of a material fact or a substantial failure to meet the required terms and conditions of the attestations, WHD may institute administrative proceedings to impose sanctions and remedies, including (but not limited to) assessment of civil money

penalties; recovery of wages due; make-whole relief for any U.S. worker who has been improperly rejected for employment, laid off, or displaced; make-whole relief for any person who has been discriminated against; and/or debarment for 1 to 5 years. *See* 29 CFR 503.19, 503.20. This regulatory authority is consistent with WHD's existing enforcement authority and is not limited by the expiration date of this rule. Therefore, in accordance with the documentation retention requirements at new 20 CFR 655.69, the petitioner must retain documents and records evidencing compliance with this rule, and must provide the documents and records upon request by DHS or DOL. In addition to the complaint process under 20 CFR part 658, subpart E, which is described above, workers who believe their rights under the H-2B program have been violated may file confidential complaints with WHD by telephone at 1-866-487-9243 or may access the telephone number via TTY by calling 1-877-889-5627 or visit <https://www.dol.gov/agencies/whd> to locate the nearest WHD office for assistance. Note that an employer is prohibited from intimidating, threatening, restraining, coercing, blacklisting, discharging, or in any manner discriminating against an employee who has, among other actions: filed a complaint related to H-2B rights and protections; consulted with a workers' rights center, community organization, labor union, legal assistance program, or attorney on H-2B rights or protections; or exercised or asserted H-2B rights and protections on behalf of themselves or others. 20 CFR 655.20(n) and 29 CFR 503.16(n).

DHS has the authority to verify any information submitted to establish H-2B eligibility at any time before or after the petition has been adjudicated by USCIS. *See, e.g.*, INA sections 103 and 214 (8 U.S.C. 1103, 1184); *see also* 8 CFR part 103 and section 214.2(h). DHS' verification methods may include, but are not limited to, review of public records and information, contact via written correspondence or telephone, unannounced physical site inspections, and interviews. USCIS will use information obtained through verification to determine H-2B eligibility and assess compliance with the requirements of the H-2B program. Subject to the exceptions described in 8 CFR 103.2(b)(16), USCIS will provide petitioners with an opportunity to address

adverse information that may result from a USCIS compliance review, verification, or site visit after a formal decision is made on a petition or after the agency has initiated an adverse action that may result in revocation or termination of an approval.

DOL's OFLC already has the authority under 20 CFR 655.70 to conduct audit examinations on adjudicated *Applications for Temporary Employment Certification*, including all appropriate appendices, and verify any information supporting the employer's attestations. OFLC uses audits of adjudicated *Applications for Temporary Employment Certification*, as authorized by 20 CFR 655.70, to ensure employer compliance with attestations made in its *Application for Temporary Employment Certification* and to ensure the employer has met all statutory and regulatory criteria and satisfied all program requirements. The OFLC CO has sole discretion to choose which *Applications for Temporary Employment Certification* will be audited. *See* 20 CFR 655.70(a). Post-adjudication audits can be used to establish a record of employer compliance or non-compliance with program requirements and the information gathered during the audit assists DOL in determining whether it needs to further investigate or debar an employer or its agent or attorney from future labor certifications.

Under this rule, an employer may submit a petition to USCIS, including a valid TLC and Form ETA-9142B-CAA-5, in which the employer attests to compliance with requirements for access to the supplemental H-2B visas allocated through 8 CFR 214.2(h)(6)(xi), including that its business is suffering irreparable harm or will suffer impending irreparable harm, and that it will conduct additional recruitment, if necessary to refresh the TLC's labor market test. DHS and DOL consider Form ETA-9142B-CAA-5 to be an appendix to the *Application for Temporary Employment Certification* and the attestations contained on the Form ETA-9142B-CAA-5 and documentation supporting the attestations to be evidence that is incorporated into and a part of the approved TLC. Therefore, DOL's audit authority includes the authority to audit the veracity of any attestations made on Form ETA-9142B-CAA-5 and documentation supporting the attestations. However, DOL's audit authority is independently authorized, and is not limited by

the expiration date of this rule. In order to make certain that the supplemental visa allocation is not subject to fraud or abuse, DHS will share information regarding Forms ETA-9142B-CAA-5 with DOL, consistent with existing authorities. This information sharing between DHS and DOL, along with relevant information that may be obtained through the separate SWA and WHD complaint systems, are expected to support DOL's identification of TLCs used to access the supplemental visa allocation for closer examination of TLCs through the audit process.

In accordance with the documentation retention requirements in this rule, the petitioner must retain documents and records proving compliance with this rule, and must provide the documents and records upon request by DHS or DOL. Under this rule, DOL will audit a significant number of TLCs used to access the supplemental visa allocation to ensure employer compliance with attestations, including those regarding the irreparable harm standard and additional employer conducted recruitment, required under this rule. In the event of an audit, the OFLC CO will send a letter to the employer and, if appropriate, a copy of the letter to the employer's attorney or agent, listing the documentation the employer must submit and the date by which the documentation must be sent to the CO. During audits under this rule, the CO will request documentation necessary to demonstrate the employer conducted all recruitment steps required under this rule and truthfully attested to the irreparable harm the employer was suffering or would suffer in the near future without the ability to employ all of the H-2B workers requested under the cap increase, including documentation the employer is required to retain under this rule. If necessary to complete the audit, the CO may request supplemental information and/or documentation from the employer during the course of the audit process. 20 CFR 655.70(c).

Failure to comply in the audit process may result in the revocation of the employer's certification or in debarment, under 20 CFR 655.72 and 655.73, respectively, or require the employer to undergo assisted recruitment in future filings of an *Application for Temporary Employment Certification*, under 20 CFR 655.71. Where an audit examination or review of information from DHS or other appropriate agencies determines that there has been fraud or

willful misrepresentation of a material fact or a substantial failure to meet the required terms and conditions of the attestations or failure to comply with the audit examination process, OFLC may institute appropriate administrative proceedings to impose sanctions on the employer. Those sanctions may result in revocation of an approved TLC, the requirement that the employer undergo assisted recruitment in future filings of an *Application for Temporary Employment Certification* for a period of up to 2 years, and/or debarment from the H-2B program and any other foreign labor certification program administered by DOL for 1 to 5 years. *See* 29 CFR 655.71, 655.72, 655.73. Additionally, OFLC has the authority to provide any finding made or documents received during the course of conducting an audit examination to DHS, WHD, IER, or other enforcement agencies. OFLC's existing audit authority is independently authorized, and is not limited by the expiration date of this rule. Therefore, in accordance with the documentation retention requirements at new 20 CFR 655.69, the petitioner must retain documents and records proving compliance with this rule, and must provide the documents and records upon request by DHS or DOL.

Petitioners must also comply with any other applicable laws, such as avoiding unlawful discrimination against U.S. workers based on their citizenship status or national origin. Specifically, the failure to recruit and hire qualified and available U.S. workers on account of such individuals' national origin or citizenship status may violate INA section 274B, 8 U.S.C. 1324b.

#### **IV. Statutory and Regulatory Requirements**

##### **A. Administrative Procedure Act**

This rule is issued without prior notice and opportunity to comment and with an immediate effective date pursuant to the Administrative Procedure Act (APA). 5 U.S.C. 553(b) and (d).

##### **1. Good cause to forgo notice and comment rulemaking.**

The APA, 5 U.S.C. 553(b)(B), authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency, for good cause, finds that those procedures are “impracticable, unnecessary, or contrary to the public interest.” Among other things, the good cause exception for forgoing notice and comment rulemaking “excuses notice and comment in emergency situations, or where delay could result in serious harm.” *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004). Although the good-cause exception is “narrowly construed and only reluctantly countenanced,” *Tenn. Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir. 1992), the Departments have appropriately invoked the exception in this case, for the reasons set forth below.

With respect to the supplemental allocations provisions in 8 CFR 214.2 and 20 CFR part 655, subpart A, as explained above, the Departments are acting to give effect to the extension of the supplemental cap authority in section 105 of Div. O of the FY 2021 Omnibus, which was extended by Congress and expires on February 18, 2022 but extends the supplemental cap authority to FY 2022.<sup>107</sup> The Departments are bypassing advance notice and comment because of the exigency created by this short timeframe for action, as well as to urgently address increased labor demand and other conditions stemming from the rapidly unfolding pandemic. In recent months, the “Great Resignation” has resulted in an adverse impact on many employers in industries that frequently use the H-2B program,<sup>108</sup> and the emergence of the Omicron variant

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<sup>107</sup> See Pub. L. 117-70 Further Extending Government Funding Act, Division A “Further Continuing Appropriations Act, 2022”, section 101 (Dec. 3, 2021) changing the Pub. L. 117-43 expiration date in section 106(3) from Dec. 3, 2021 to Feb. 18, 2022, and Pub. L. 117-43 Extending Government Funding and Delivering Emergency Assistance Act, Division A “Continuing Appropriations Act, 2022”, Section 101 and 106(3) (Oct. 3, 2021) extending DHS funding, including authority under section 105 of title I of Division O of Pub. L. 116-260 through December 3, 2021.

<sup>108</sup> See Megan Leonhardt, *The Great Resignation is hitting these industries hardest*, Fortune, <https://fortune.com/2021/11/16/great-resignation-hitting-these-industries-hardest/> (Nov. 16, 2021) (“The industries hit hardest by quits in September are leisure and hospitality—including those who work in the arts and entertainment, as well as in restaurants and hotels—trade, transportation and utilities, professional services and retail.”). These observations made in the preceding source align with USCIS analysis of labor demand in industry sectors that are most represented in the H-2B program, as discussed in the EO 12866 analysis. See also, e.g., Paul Krugman, *Working Out: Is the Great Resignation a Great Rethink?*, N.Y. Times, <https://www.nytimes.com/2021/11/05/opinion/great-resignation-quit-job.html> (Nov. 5, 2021) (“...there’s considerable evidence that ‘workers at low-wage jobs [have] historically underestimated how bad their jobs are.’ When something —like, say, a deadly pandemic —forces them out of their rut, they realize what they’ve been putting up with. And because they can learn from the experience of other workers, there may be a ‘quits multiplier’ in which the decision of some workers to quit ends up inducing other workers to follow suit.”).

has uncertain implications for public health<sup>109</sup> as well as on inflation<sup>110</sup> and supply chains.<sup>111</sup>

USCIS received more than enough petitions to meet the H-2B visa statutory cap for the first half of FY 2022 on September 30, 2021,<sup>112</sup> which is a month and a half earlier than when the statutory cap for the first half of FY 2020 was reached.<sup>113</sup> USCIS rejected and returned the petitions and associated filing fees to petitioners for all cap-subject petitions received after September 30, 2021. Given high demand by American businesses for H-2B workers, rapidly evolving economic conditions and labor demand, and the very short time remaining to authorize additional visa numbers to help prevent further irreparable harm currently experienced by some U.S. employers or avoid impending economic harm for others,<sup>114</sup> a decision to undertake notice and comment rulemaking would likely delay final action on this matter by weeks or months, and would, therefore, greatly complicate and potentially preclude the Departments from successfully exercising the authority created by section 105, Pub. L. 117-43, and Pub. L. 117-70.

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<sup>109</sup>See Annika Kim Constantino, *Omicron detected in Florida and Texas as it takes root in 25 U.S. states*, CNBC, <https://www.cnbc.com/2021/12/10/omicron-detected-in-florida-texas-and-other-states-as-it-takes-root-across-the-us.html> (Dec. 10, 2021).

<sup>110</sup> On December 10, 2021, BLS reported that the CPI-U increased 0.8 percent in November on a seasonally adjusted basis after rising 0.9 percent in October. Over the previous 12 months, the all items index increased 6.8 percent before seasonal adjustment. See BLS, Economic News Release, Consumer Price Index Summary (Dec. 20, 2021), <https://www.bls.gov/news.release/cpi.nr0.htm>.

<sup>111</sup> See, e.g., Mitchell Hartman, *Omicron's impact on inflation and supply chains is uncertain*, Marketplace, <https://www.marketplace.org/2021/12/01/omicrons-impact-on-inflation-and-supply-chains-is-uncertain/> (Dec. 1, 2021) (“People have trouble getting to work through lockdowns and what have you, and labor gets scarcer — particularly for those jobs where being present at work matters. Supply goes down and has an upward pressure on pricing . . .”); Alyssa Fowers & Rachel Siegel, *Five charts explaining why inflation is at a near 40-year high*, Wash. Post, <https://www.washingtonpost.com/business/2021/10/14/inflation-prices-supply-chain/> (Oct. 14, 2021, last updated Dec. 10, 2021) (“Prices for meat, poultry, fish and eggs have surged in particular above other grocery categories. The White House has pointed to broad consolidation in the meat industry, saying that large companies bear some of the responsibility for pushing prices higher. . . Meat industry groups disagree, arguing that the same supply-side issues rampant in the rest of the economy apply to proteins because it costs more to transport and package materials, while tight labor market has held back meat production.”).

<sup>112</sup> USCIS, USCIS Reaches H-2B Cap for First Half of FY 2022, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2022> (Oct. 12, 2021).

<sup>113</sup> November 16, 2020 was the last receipt date for the first half of FY 2020. See USCIS, USCIS Reaches H-2B Cap for First Half of FY 2021, <https://www.uscis.gov/news/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2021> (Nov. 18, 2020).

<sup>114</sup> See Jason Douglas et al, *Omicron Disrupts Government Plans to Lure Migrant Workers as Labor Shortages Bite*, Wall Street Journal, <https://www.wsj.com/articles/omicron-disrupts-government-plans-to-lure-migrant-workers-as-labor-shortages-bite-11639132203> (Dec. 10, 2021) (“‘I’ve lost customers because people don’t have the patience to wait—it’s horrible, horrible,’ she said. ‘The sad part is, if I got my workers, my business would grow exponentially.’ . . . Ms. Ogden has tried to find locals to fill the jobs. She even asked her congressman to put a sign in his office. She offered about \$18 an hour, plus overtime. No one took a job. Congress raised the cap for H-2B visas this year, up to a total of 66,000 for fiscal 2022, but that still falls far short of demand.”).



The temporary portability and change of employer provisions in 8 CFR 214.2 and 274a.12 are further supported by conditions created by the COVID-19 pandemic. On January 31, 2020, the Secretary of Health and Human Services declared a public health emergency under section 319 of the Public Health Service Act in response to COVID-19 retroactive to January 27, 2020.<sup>115</sup> This determination that a public health emergency exists due to COVID-19 has subsequently been renewed seven times: on April 21, 2020, on July 23, 2020, on October 2, 2020, January 7, 2021, on April 15, 2021, on July 19, 2021 and most recently on October 15, 2021, effective October 18, 2021.<sup>116</sup> On March 13, 2020, then-President Trump declared a National Emergency concerning the COVID-19 outbreak, retroactive to March 1, 2020, to control the spread of the virus in the United States.<sup>117</sup> In response to the Mexican government's call to increase social distancing in that country, DOS announced the temporary suspension of routine immigrant and nonimmigrant visa services processed at the U.S. Embassy in Mexico City and all U.S. consulates in Mexico beginning on March 18, 2020, and it later expanded the temporary suspension of routine immigrant and nonimmigrant visa services at all U.S. Embassies and Consulates.<sup>118</sup> On July 22, 2020, DOS indicated that embassies and consulates should continue to provide emergency and mission critical visa services to the extent possible and could begin a phased resumption of routine visa services as local conditions and resources allow.<sup>119</sup> On March 26, 2020 DOS designated the H-2 programs as essential to the economy and food security of the United States and a national security priority; DOS indicated that U.S. Embassies

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<sup>115</sup> HHS, Determination of Public Health Emergency, 85 FR 7316 (Feb. 7, 2020). *See also*, <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx> (Jan. 31, 2020) .

<sup>116</sup> See, HHS, Renewal of Determination that a Public Health Emergency Exists, <https://www.phe.gov/emergency/news/healthactions/phe/Pages/COVID-15Oct21.aspx> (Oct. 15, 2021)..

<sup>117</sup> President of the United States, Proclamation 9994 of March 13, 2020, Declaring a National Emergency Concerning the Coronavirus Disease (COVID-19) Outbreak, 85 FR 15337 (Mar. 18, 2020).

<sup>118</sup> DOS, Suspension of Routine Visa Services, <https://travel.state.gov/content/travel/en/News/visas-news/suspension-of-routine-visa-services.html> (last updated July 22, 2020).

<sup>119</sup> <https://travel.state.gov/content/travel/en/News/visas-news/suspension-of-routine-visa-services.html>

and Consulates will continue to process H-2 cases to the extent possible and implemented a change in its procedures, to include interview waivers.<sup>120</sup>

Travel restrictions have also changed over time as the pandemic has continued to evolve. On October 25, 2021, the President issued Proclamation 10294, *Advancing the Safe Resumption of Global Travel During the COVID-19 Pandemic*, which, together with other policies, advance the safety and security of the air traveling public and others, while also allowing the domestic and global economy to continue its recovery from the effects of the COVID-19 pandemic. The proclamation bars the entry of noncitizen adult nonimmigrants into the United States via air transportation unless they are fully vaccinated against COVID-19, with certain exceptions.<sup>121</sup> On January 22, 2022, similar requirements entered into force at land ports of entry and ferry terminals.<sup>122</sup>

On November 26, 2021, the President issued another Proclamation suspending the entry into the United States, of immigrants or nonimmigrants, of noncitizens who were physically present within certain Southern African countries during the 14-day period preceding their entry or attempted entry into the United States.<sup>123</sup> On December 28, 2021, the President revoked the November 26 Proclamation.<sup>124</sup> And on December 2, 2021, CDC announced that, beginning December 6, 2021, all air travelers over the age of two, regardless of citizenship or vaccination status, will be required to show a negative pre-departure COVID-19 viral test taken the day before they board their flight to the United States, or documentation of recent recovery from

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<sup>120</sup> DOS, *Important Announcement on Waivers of the Interview Requirement for Certain Nonimmigrant Visas*, <https://travel.state.gov/content/travel/en/News/visas-news/important-announcement-on-waivers-of-the-interview-requirement-for-certain-nonimmigrant-visas.html> (last updated Dec. 23, 2021).

<sup>121</sup> See 86 FR 59603 (Oct. 28, 2021) (Presidential Proclamation); see also 86 FR 61224 (Nov. 5, 2021) (implementing CDC Order).

<sup>122</sup> See 87 FR 3425 (Jan. 24, 2022) (restrictions at United States-Mexico border); 87 FR 3429 (Jan. 24, 2022) (restrictions at United States-Canada border).

<sup>123</sup> See A Proclamation on Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus Disease 2019 (Nov. 26, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/11/26/a-proclamation-on-suspension-of-entry-as-immigrants-and-nonimmigrants-of-certain-additional-persons-who-pose-a-risk-of-transmitting-coronavirus-disease-2019/>.

<sup>124</sup> See A Proclamation on Revoking Proclamation 10315 (Dec. 28, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/12/28/a-proclamation-on-revoking-proclamation-10315/>.

COVID-19.<sup>125</sup> Shifting requirements as well as varying availability of vaccines and tests in some H-2B nonimmigrants' home countries could complicate travel.

In addition to travel restrictions and impacts of the pandemic on visa services, as discussed elsewhere in this rule, current efforts to curb the pandemic in the United States and worldwide have been partially successful. With the emergence of COVID-19 variants, including the uncertainty surrounding the most recent variant, Omicron; different rates of vaccination ; and other uncertainties associated with the evolving pandemic situation, DHS anticipates that H-2B employers may need additional flexibilities, beyond supplemental visa numbers, to meet all of their labor needs, particularly if some U.S. and H-2B workers become unavailable due to illness or other restrictions related to the spread of COVID-19. Therefore, DHS is acting expeditiously to put in place rules that will facilitate the continued employment of H-2B workers already present in the United States. This action will help employers fill these critically necessary nonagricultural job openings and protect U.S. businesses' economic investments in their operations.

Courts have found "good cause" under the APA when an agency is moving expeditiously to avoid significant economic harm to a program, program users, or an industry. Courts have held that an agency may use the good cause exception to address "a serious threat to the financial stability of [a government] benefit program," *Nat'l Fed'n of Fed. Emps. v. Devine*, 671 F.2d 607, 611 (D.C. Cir. 1982), or to avoid "economic harm and disruption" to a given industry, which would likely result in higher consumer prices, *Am. Fed'n of Gov't Emps. v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981).

Consistent with the above authorities, the Departments are bypassing notice and comment to prevent "serious economic harm to the H-2B community," including U.S. employers, associated U.S. workers, and related professional associations, that could result from ongoing

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<sup>125</sup> See CDC, *Requirement for Proof of Negative COVID-19 Test or Documentation of Recovery from COVID-19* (Dec. 2, 2021).

uncertainty over the status of the numerical limitation, in other words, the effective termination of the program through the remainder of FY 2021. *See Bayou Lawn & Landscape Servs. v. Johnson*, 173 F. Supp. 3d 1271, 1285 & n.12 (N.D. Fla. 2016). The Departments note that this action is temporary in nature, *see id.*,<sup>126</sup> and includes appropriate conditions to ensure that it affects only those businesses most in need, and also protects H-2B and U.S. workers.

## **2. Good cause to proceed with an immediate effective date**

The APA also authorizes agencies to make a rule effective immediately, upon a showing of good cause, instead of imposing a 30-day delay. 5 U.S.C. 553(d)(3). The good cause exception to the 30-day effective date requirement is easier to meet than the good cause exception for foregoing notice and comment rulemaking. *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992); *Am. Fed’n of Gov’t Emps., AFL–CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981); *U.S. Steel Corp. v. EPA*, 605 F.2d 283, 289–90 (7th Cir. 1979). An agency can show good cause for eliminating the 30-day delayed effective date when it demonstrates urgent conditions the rule seeks to correct or unavoidable time limitations. *U.S. Steel Corp.*, 605 F.2d at 290; *United States v. Gavrilovic*, 511 F.2d 1099, 1104 (8th Cir. 1977). For the same reasons set forth above expressing the need for immediate action, we also conclude that the Departments have good cause to dispense with the 30-day effective date requirement.

## **B. Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review)**

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary and to the extent permitted by law, to proceed only if the benefits justify the costs and to select the regulatory approach that

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<sup>126</sup> Because the Departments have issued this rule as a temporary final rule, this rule – with the sole exception of the document retention requirements – will be of no effect after September 30, 2022, even if Congress includes an additional or similar authority akin to Pub. L. 117-43, as extended by Pub. L. 117-70 on the same terms as section 105, in a subsequent act of Congress.

maximizes net benefits. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits; reducing costs; simplifying and harmonizing rules; and promoting flexibility through approaches that preserve freedom of choice (including through “provision of information in a form that is clear and intelligible”). It also allows consideration of equity, fairness, distributive impacts, and human dignity, even if some or all of these are difficult or impossible to quantify.

The Office of Information and Regulatory Affairs has determined that this rule is a “significant regulatory action,” although not an economically significant regulatory action. Accordingly, the Office of Management and Budget has reviewed this regulation.

### **Summary**

With this temporary final rule (TFR), DHS is authorizing the immediate release of an additional 20,000 H-2B visas. By the authority given under Public Law 117-43, and extended by Public Law 117-70, on the same terms as section 105 of the Further Consolidated Appropriations Act, 2021, Pub. L. 116-260 (FY 2021 Omnibus), DHS is raising the H-2B cap by an additional 20,000 visas during FY 2022 for positions with start dates on or before March 31, 2022 to businesses that: (1) show that there are an insufficient number of U.S. workers to meet their needs in the first half of FY 2022; (2) attest that their businesses are suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all of the H-2B workers requested on their petition; and (3) petition for returning workers who were issued an H-2B visa or were otherwise granted H-2B status in FY 2019, 2020, or 2021, unless the H-2B worker is a national of one of the Northern Triangle countries or Haiti. Additionally, up to 6,500 of the 20,000 visas may be granted to workers from the Northern Triangle countries and Haiti who are exempt from the returning worker requirement. This TFR aims to prevent irreparable harm to certain U.S. businesses by allowing them to hire additional H-2B workers within FY 2022.

The estimated total costs to petitioners range from \$4,803,155 to \$5,324,039. The estimated total cost to the Federal Government is \$467,820. Therefore, DHS estimates that the

total cost of this rule ranges from \$5,270,975 to \$5,791,859. The benefits of this rule are diverse, though some of them are difficult to quantify. They include:

- (1) Employers benefit from this rule significantly through increased access to H-2B workers;
- (2) Customers and others benefit directly or indirectly from that increased access;
- (3) H-2B workers benefit from this rule significantly through obtaining jobs and earning wages, potential ability to port and earn additional wages, and increased information on COVID-19 and vaccination distribution. DHS recognizes that some of the effects of these provisions may occur beyond the borders of the United States;<sup>127</sup>
- (4) Some American workers may benefit to the extent that they do not lose jobs through the reduced or closed business activity that might occur if fewer H-2B workers were available;
- (5) The existence of a lawful pathway, for the 6,500 visas set aside for new workers from Guatemala, Honduras, El Salvador, and Haiti, is likely to provide multiple benefits in terms of U.S. policy with respect to the Northern Triangle countries and Haiti; and
- (6) The Federal Government benefits from increased evidence regarding attestations.

Table 1 provides a summary of the provisions in this rule and some of their impacts.

**Table 1. Summary of the TFR's Provisions and Economic Impact**

<b>Current Provision</b>	<b>Changes Resulting from the Provisions of the TFR</b>	<b>Expected Costs of the Provisions of the TFR</b>	<b>Expected Benefits of the Provisions of the TFR</b>
- The current statutory cap limits H-2B visa allocations to 66,000 workers a year.	- The amended provisions will allow for an additional 20,000 H-2B temporary workers. Up to 6,500 of the 20,000 additional visas will be reserved for workers who are	- The total estimated cost to file Form I-129 by human resource specialists is approximately \$558,461. The total estimated cost to file Form I-129 and Form	- Form I-129 petitioners would be able to hire temporary workers needed to prevent their businesses from suffering irreparable harm. - Businesses that are dependent on the success of other businesses that are dependent on

<sup>127</sup> See, e.g., Arnold Brodbeck et al., Seasonal Migrant Labor in the Forest Industry of the Southeastern United States: The Impact of H-2B Employment on Guatemalan Livelihoods, 31 Society and Natural Resources 1012 (2018).

	<p>nationals of Guatemala, Honduras, El Salvador, and Haiti and will be exempt from the returning worker requirement.</p>	<p>G-28 will range from approximately \$624,952 if filed by in-house lawyers to approximately \$836,755 if filed by outsourced lawyers. The total estimated cost associated with filing additional petitions ranges from \$1,183,413 to \$1,395,216 depending on the filer.</p> <ul style="list-style-type: none"> <li>- The total estimated costs associated with filing Form I-907 if it is filed with Form I-129 is \$974,909 if filed by human resource specialists. The total estimated costs associated with filing Form I-907 would range from approximately \$795,707 if filed by an in-house lawyer to approximately \$817,943 if filed by an outsourced lawyer. The total estimated costs associated with requesting premium processing ranges from approximately \$1,770,616 to approximately \$1,792,852.</li> <li>- DHS may incur additional adjudication costs as more applicants file Form I-129. However, these additional costs to USCIS are expected to be covered by the fees paid for filing the form, which have been accounted for in costs to petitioners.</li> </ul>	<p>H-2B workers would be protected from the repercussions of local business failures.</p> <ul style="list-style-type: none"> <li>- Some American workers may benefit to the extent that they do not lose jobs through the reduced or closed business activity that might occur if fewer H-2B workers were available.</li> </ul>
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	<p>- Petitioners will be required to fill out the newly created Form ETA-9142-B-CAA-5, Attestation for Employers Seeking to Employ H-2B Nonimmigrant Workers Under Section 105 of Div. O of the Consolidated Appropriations Act, 2021.</p>	<p>- The total estimated cost to petitioners to complete and file Form ETA-9142-B-CAA-5 is approximately \$472,316.</p>	<p>- Form ETA-9142-B-CAA-5 will serve as initial evidence to DHS that the petitioner meets the irreparable harm standard and returning worker requirements.</p>
	<p>- Petitioners would be required to conduct an additional round of recruitment.</p>	<p>- The total estimated cost to petitioners to conduct an additional round of recruitment is approximately \$178,015.</p>	<p>- The additional round of recruitment will ensure that a U.S. worker that is willing and able to fill the position is not replaced by a nonimmigrant worker.</p>
	<p>- Employers of H-2B workers would be required to provide information about equal access to COVID-19 vaccines and vaccination distribution sites.</p>	<p>- The total estimated cost to petitioners to provide COVID-19 vaccines and vaccination distribution site information is approximately \$601.</p>	<p>- Workers would be given information about equal access to vaccines and vaccination distribution.</p>
	<p>- An H-2B nonimmigrant who is physically present in the United States may port to another employer.</p>	<p>- The total estimated cost to file Form I-129 by human resource specialists is approximately \$63,965. The total estimated cost to file Form I-129 and Form G-28 will range from approximately \$72,242 if filed by in-house lawyers to approximately \$96,715 if filed by outsourced lawyers.</p> <p>- The total estimated costs associated with filing Form I-907 if it is filed with Form I-129 is \$111,549 if filed by human resource specialists. The total estimated costs</p>	<p>- H-2B workers present in the United States will be able to port to another employer and potentially extend their stay and, therefore, earn additional wages.</p> <p>- An H-2B worker with an employer that is not complying with H-2B program requirements would have additional flexibility in porting to another employer's certified position.</p> <p>- This provision would ensure employers will be able to hire the H-2B workers they need.</p>



		<p>associated with filing Form I-907 would range from approximately \$92,052 if filed by an in-house lawyer to approximately \$94,625 if filed by an outsourced lawyer.</p> <ul style="list-style-type: none"> <li>- The total estimated costs associated with the portability provision ranges from \$339,808 to \$366,865, depending on the filer.</li> <li>- DHS may incur some additional adjudication costs as more petitioners file Form I-129. However, these additional costs to USCIS are expected to be covered by the fees paid for filing the form, which have been accounted for in costs to petitioners.</li> </ul>	
	<p>- DHS and DOL intend to conduct a number of audits during the period of temporary need to verify compliance with H-2B program requirements, including the irreparable harm standard as well as other key worker protection provisions implemented through this rule.</p>	<p>- Employers will have to comply with audits for an estimated total opportunity cost of time of \$290,400.</p> <p>- It is expected both DHS and DOL will be able to shift resources to be able to conduct these audits without incurring additional costs. However, the Departments will incur opportunity costs of time. The audits are expected to take a total of approximately 6,000 hours and cost approximately \$467,820.</p>	<p>- DOL and DHS audits will yield evidence of the efficacy of attestations in enforcing compliance with H-2B supplemental cap requirements.</p> <p>- Conducting a significant number of audits will discourage uncorroborated attestations.</p>
Familiarization Cost	<p>- Petitioners or their representatives with</p>	<p>- Petitioners or their representatives will need to read and</p>	<p>- Petitioners will have the necessary information to take</p>

	familiarize themselves with the rule	understand the rule at an estimated total opportunity costs of time that ranges from \$567,986 to \$827,774.	advantage of and comply with the provisions of this rule
Source: USCIS and DOL analysis.			

## Background and Purpose of the Proposed Rule

The H-2B visa classification program was designed to serve U.S. businesses that are unable to find a sufficient number of U.S. workers to perform nonagricultural work of a temporary or seasonal nature. For a nonimmigrant worker to be admitted into the United States under this visa classification, the hiring employer is required to: 1) receive a temporary labor certification (TLC) from the Department of Labor (DOL); and 2) file Form I-129 with DHS. The temporary nature of the services or labor described on the approved TLC is subject to DHS review during adjudication of Form I-129.<sup>128</sup> The current INA statute sets the annual number of H-2B visas for workers performing temporary nonagricultural work at 66,000 to be distributed semi-annually beginning in October (33,000) and in April (33,000).<sup>129</sup> Any unused H-2B visas from the first half of the fiscal year will be available for employers seeking to hire H-2B workers during the second half of the fiscal year. However, any unused H-2B visas from one fiscal year do not carry over into the next and will therefore not be made available.<sup>130</sup> Once the statutory H-2B visa cap limit has been reached, petitioners must wait until the next half of the fiscal year, or the beginning of the next fiscal year, for additional visas to become available.

On Dec 27, 2020, the President signed the FY 2021 Omnibus that contains a provision (Sec. 105 of Div. O) permitting the Secretary of Homeland Security, under certain circumstances, to increase the number of H-2B visas available to U.S. employers,

<sup>128</sup> Revised effective 1/18/2009; 73 FR 78104; 74 FR 2837.

<sup>129</sup> See 8 U.S.C. 1184(g)(1)(B), INA 214(g)(1)(B) and 8 U.S.C. 1184(g)(4), INA 214(g)(4).

<sup>130</sup> A Temporary Labor Certification (TLC) approved by the Department of Labor must accompany an H-2B petition. The employment start date stated on the petition must match the start date listed on the TLC. See 8 CFR 214.2(h)(6)(iv)(A) and (D).

notwithstanding the established statutory numerical limitation. On December 3, 2021, Congress extended this authority to eligible employers whose employment needs for FY 2022 cannot be met under the general fiscal year statutory cap.<sup>131</sup> After consulting with the Secretary of Labor, the Secretary of the Homeland Security has determined it is appropriate to exercise his discretion and raise the H-2B cap by up to an additional 20,000 visas for FY 2022 positions with start dates on or before March 31, 2022, for those businesses who would qualify under certain circumstances.

These businesses must attest that they are suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all of the H-2B workers requested on their petition. The Secretary has determined that up to 13,500 of the 20,000 these supplemental visas will be limited to specified H-2B returning workers for nationals of any country. Specifically, these individuals must be workers who were issued H-2B visas or were otherwise granted H-2B status in fiscal years 2019, 2020, or 2021. The Secretary has also determined that up to 6,500 of the 20,000 additional visas will be reserved for workers who are nationals of Guatemala, Honduras, El Salvador, and Haiti, and that these 6,500 workers will be exempt from the returning worker requirement. Once the 6,500 visa limit has been reached, a petitioner may continue to request H-2B visas for workers who are nationals of Guatemala, Honduras, El Salvador, and Haiti but these workers must be returning workers.

## **Population**

This rule would affect those employers that file Form I-129 on behalf of nonimmigrant workers they seek to hire under the H-2B visa program. More specifically, this rule would affect those employers that can establish that their business is suffering irreparable harm or will suffer

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<sup>131</sup> Sections 101 and 106(3) of Division A of Public Law 117-43, Continuing Appropriations Act, 2022, and section 101 of Division A of Public Law 117-70, Further Continuing Appropriations Act, 2022 provide the DHS Secretary with the authority to make available additional H-2B visas for FY 2022 on the same terms as Section 105 of Division O of the Consolidated Appropriations Act, 2021, Public Law 116-260 (FY 2021 Omnibus). This authority expires on February 18, 2022.

impending irreparable harm without the ability to employ all of the H-2B workers requested on their petition and without the exercise of authority that is the subject of this rule. Due to the temporary nature of this rule and the limited time left for employers to begin the H-2B filing process for positions with FY 2022 employment start dates on or before March 31, 2022,<sup>132</sup> DHS believes that it is reasonable to assume that eligible petitioners for these additional 20,000 visas will generally be those employers that have already completed the steps to receive an approved TLC prior to the issuance of this rule.

This rule would also have additional impacts on the population of H-2B employers and workers presently in the United States by permitting some H-2B workers to port to another certified employer. These H-2B workers would continue to earn wages and gaining employers would continue to obtain necessary workers.

*Population that will file a Form I-129, Petition for a Nonimmigrant Worker*

According to DOL OFLC's certification data for FY 2021, as of December 1, 2021, about 3,257 TLCs for 86,627 H-2B positions were received with expected work start dates between October 1, 2021 and March 1, 2022. DOL OFLC has approved 2,469 certifications for 65,717 H-2B positions and is still reviewing the remaining 347 TLC requests for 7,301 H-2B positions. DOL OFLC has denied, withdrawn, rejected, or returned 441 certifications for 13,609 H-2B positions.<sup>133</sup> However, many of these certified worker positions have already been filled under the semi-annual cap of 33,000 and, for approximately 16 percent of the worker positions certified and still under review by DOL, employers indicated on the Form ETA-9142B their intention to employ some or all of the H-2B workers under the application who will be exempt

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<sup>132</sup> This assumption is based on the fact that, under DOL regulations, employers must apply for a TLC 75 to 90 days before the start date of work. 20 CFR 655.15(b).

<sup>133</sup> As of December 1, 2021, DOL OFLC had denied 235 applications for 6,375 positions and rejected 74 applications for 1,063 positions. Employers had withdrawn 132 applications for 6,171 positions. This totals 441 applications for 13,609 positions either denied, rejected, or withdrawn.

from the statutory visa cap.<sup>134</sup> Additionally, based on the average TLC requests received for work start dates between March 2 and 31 during FY 2019-2021, DOL OFLC estimates that it may receive another 65 TLC requests covering approximately 2,100 H-2B worker positions for the remainder of the first half visa allotment period ending March 31, 2022. The total universe of approved, pending, and projected future TLCs, as of December 1, 2021, is 2,881 for 75,118 H-2B worker positions.<sup>135</sup> Assuming 16 percent of the approved, pending, and projected 75,118 H-2B worker petitions will be exempt from the statutory visa cap, we estimate applications requesting approximately 63,099 H-2B beneficiaries.<sup>136</sup>

Of the expected 2,881 certified Applications for Temporary Employment Certification, USCIS data shows that 1,655 H-2B petitions for 40,749 positions with approved certifications were already filed toward the first semi-annual cap of 33,000 visas.<sup>137</sup> Therefore, we estimate that approximately 1,226 Applications for Temporary Employment Certification may be filed towards this FY 2022 supplemental cap.<sup>138</sup> USCIS recognizes that some employers would have to submit two Forms I-129 if they choose to request H-2B workers under both the returning worker and Northern Triangle Countries/Haiti cap. At this time, USCIS cannot predict how many employers will choose to take advantage of this set-aside, and therefore recognize that the number of petitions may be underestimated.

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<sup>134</sup> Of the 65,717 certified H-2B worker positions, approximately 14 percent (9,458 certified H-2B worker positions) may be employed by employers under a cap exempt status. Of the 7,301 H-2B workers positions requested for certification and still under DOL review, approximately 26 percent (1,933 pending H-2B worker positions) may be employed by employers under a cap exempt status. This totals 11,391 H-2B workers positions associated with approved and pending TLCs where the H-2B worker may be employed by the employer under a cap exempt status; or 16 percent of all 73,018 positions associated with approved and pending TLCs.

<sup>135</sup> Calculation for petitioners: 2,469 approved TLCs + 347 pending + 65 projected future TLCs = 2,881 approved, pending, and project future TLCs.  
Calculation for beneficiaries: 65,717 positions associated with approved TLCs + 7,301 positions associated with pending TLCs + 2,100 positions associated with projected future TLCs = 75,118 positions associated with approved, pending, and projected future TLCs.

<sup>136</sup> Calculation: 75,118 approved, pending, and projected H-2B worker positions \* 84% of requested workers not being exempt from the statutory cap = 63,099 requested H-2B beneficiaries subject to the statutory cap.

<sup>137</sup> USCIS, Office of Performance and Quality, Data pulled on December 2, 2021.

<sup>138</sup> Calculation: 2,881 approved, pending, and projected TLCs – 1,665 petitions for H-2B workers = 1,226 expected additional petitions for H-2B workers

*Population that files Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative*

If a lawyer or accredited representative submits Form I-129 on behalf of the petitioner, Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, must accompany the Form I-129 submission.<sup>139</sup> Using data from FY 2017 to FY 2021, we estimate that approximately 44.43 percent of Form I-129 petitions will be filed by a lawyer or accredited representative (Table 2). Table 2 shows the percentage of Form I-129 H-2B petitions that were accompanied by a Form G-28. Therefore, we estimate that 545 Forms I-129 and Forms G-28 will be filed by in-house or outsourced lawyers, and that 681 Forms I-129 will be filed by human resources (HR) specialists.<sup>140</sup>

<b>Table 2: Form I-129 H-2B Petition Receipts That Were Accompanied by a Form G-28, FY 2017-2021.</b>			
Fiscal Year	Number of Form I-129 H-2B petitions accompanied by a Form G-28	Total Number of Form I-129 H-2B petitions received	Percent of Form I-129 H-2B petitions accompanied by a Form G-28
2017	2,615	6,112	42.78
2018	2,626	6,148	42.71
2019	3,335	7,461	44.70
2020	2,434	5,422	44.89
2021	4,229	9,159	46.17
2017 - 2021 Total	15,239	34,302	44.43
Source: USCIS Claims3 database, queried using the SMART utility by the USCIS Office of Policy and Strategy on April 8, 2021 and December 2, 2021.			

*Population that files Form I-907, Request for Premium Processing Service*

Employers may use Form I-907, Request for Premium Processing Service, to request faster processing of their Form I-129 petitions for H-2B visas. Table 3 shows the percentage of Form I-129 H-2B petitions that were filed with a Form I-907. Using data from FY 2017 to FY

<sup>139</sup> USCIS, [Filing Your Form G-28](https://www.uscis.gov/forms/filing-your-form-g-28), <https://www.uscis.gov/forms/filing-your-form-g-28>.

<sup>140</sup> Calculation: 1,226 estimated additional petitions \* 44.43 percent of petitions filed by a lawyer = 545 petitions (rounded) filed by a lawyer.

Calculation: 1,226 estimated additional petitions – 545 petitions filed by a lawyer = 681 petitions filed by an HR specialist.

2021, USCIS estimates that approximately 93.67 percent of Form I-129 H-2B petitioners will file a Form I-907 requesting premium processing, though this could be higher because of the timing of this rule. Based on this historical data, USCIS estimates that 1,148 Forms I-907 will be filed with the Forms I-129 as a result of this rule.<sup>141</sup> Of these 1,148 premium processing requests, we estimate that 510 Forms I-907 will be filed by in-house or outsourced lawyers and 638 will be filed by HR specialists.<sup>142</sup>

**Table 3: Form I-129 H-2B Petition Receipts that Were Accompanied by a Form I-907, FY 2017-2021.**

Fiscal Year	Number of Form I-129 H-2B Petitions Accompanied by Form I-907	Total Number of Form I-129 H-2B Petitions Received	Percent of Form I-129 H-2B Petitions Accompanied by Form I-907
2017	5,932	6,112	97.05
2018	5,986	6,148	97.36
2019	7,227	7,461	96.86
2020	4,341	5,422	80.06
2021	8,646	9,159	94.40
2017 - 2021 Total	32,132	34,302	93.67
Source: USCIS Claims3 database, queried using the SMART utility by the USCIS Office of Policy and Strategy on April 8, 2021 and December 2, 2021.			

*Population that files Form ETA-9142-B-CAA-5, Attestation for Employers Seeking to Employ H-2B Nonimmigrant Workers under Section 105 of Division O of the Consolidated Appropriations Act, 2021 Public Law 116-260 and Public Laws 117-43 and 117-70*

Petitioners seeking to take advantage of the FY 2022 H-2B supplemental visa cap will need to file a Form ETA-9142-B-CAA-5 attesting that their business is suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all of the H-2B workers requested on the petition, comply with third party notification, and maintain required

<sup>141</sup> Calculation: 1,226 estimated additional petitions \* 93.67 percent premium processing filing rate = 1,148 (rounded) additional Form I-907.

<sup>142</sup> Calculation: 1,148 additional Form I-907 \* 44.43 percent of petitioners represented by a lawyer = 510 (rounded) additional Form I-907 filed by a lawyer.

Calculation: 1,148 additional Form I-907 - 510 additional Form I-907 filed by a lawyer = 638 additional Form I-907 filed by an HR specialist.

records, among other requirements. DOL estimates that each of the 1,226 petitioners will need to file a Form ETA-9142-B-CAA-5 and comply with its provisions.

*Population affected by the portability provision*

The population affected by this provision are nonimmigrants in H-2B status who are present in the United States and the employers with valid TLCs seeking to hire H-2B workers. We use the population of 66,000 H-2B workers authorized by statute and 20,000 additional H-2B workers authorized by this supplemental cap regulation as a proxy for the H-2B population that could be currently present in the United States.<sup>143</sup> We use the number of approved, pending, and projected TLCs (2,881) to estimate the potential number of Form I-129 H-2B petitions that incur impacts associated with this porting provision. USCIS uses the number of Forms I-129 filed for extension of stay due to change of employer relative to the Forms I-129 filed for new employment from FY 2011 to FY 2020, the ten years prior to the implementation of first portability provision in a H-2B supplemental cap TFR, to estimate the baseline rate. We compare the average rate from FY 2011-FY 2020 to the rate from FY 2021. Table 4 presents the number of Form I-129 filed extensions of stay due to change of employer and Form I-129 filed for new employment for Fiscal year 2011 through 2020. The average rate of extension of stay due to change of employer compared to new employment is approximately 10.5 percent.

<p><b>Table 4: Numbers of Form I-129 H-2B Petitions Filed for Extension of Stay due to Change of Employer and Form I-129 H-2B Petitions Filed for New Employment, FY 2011 – FY 2020</b></p>
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<sup>143</sup> H-2B workers may have varying lengths in time approved on their H-2B visas. This number may overestimate H-2B workers who have already completed employment and departed and may underestimate H-2B workers not reflected in the current cap and long-term H-2B workers. In FY 2020, 346 requests for change of status to H-2B were approved by USCIS and 3,505 crossings of visa-exempt H-2B workers were processed by Customs and Border Protection (CBP). *See Characteristics of H-2B Nonagricultural Temporary Workers FY2020 Report to Congress at <https://www.uscis.gov/sites/default/files/document/reports/H-2B-FY20-Characteristics-Report.pdf>*. USCIS assumes some of these workers, along with current workers with a valid H-2B visa under the cap, could be eligible to port under this new provision. USCIS does not know the exact number of H-2B workers who would be eligible to port at this time but uses the cap and supplemental cap allocations as a possible proxy for this population.



Fiscal Year	Form I-129 H-2B petitions filed for extension of stay due to change of employer	Form I-129 H-2B petitions filed for new employment	Rate of extension to stay due to change of employer filings relative to new employment filings
2011	360	3,887	0.093
2012	293	3,688	0.079
2013	264	4,120	0.064
2014	314	4,666	0.067
2015	415	4,596	0.090
2016	427	5,750	0.074
2017	556	5,298	0.105
2018	744	5,136	0.145
2019	812	6,251	0.130
2020	804	3,997	0.201
Ten-Year Average			0.105
Source: USCIS, Office of Performance and Quality, Data pulled on December 6, 2021.			

In FY 2021, the first year a H-2B supplemental cap included a portability provision, there were 1,113 Forms I-129 filed for extension of stay due to change of employer compared to 7,208 Forms I-129 filed for new employment.<sup>144</sup> This is a rate of 15.4 percent, which is above our earlier 10.5 percent rate, and is our estimate of the rate expected in future years with a portability provision in the supplemental visa allocation.<sup>145</sup> Using the 2,881 as our estimate for the number of Forms I-129 filed for H-2B new employment in the first half of FY 2022, we estimate that 303 Forms I-129 for extension of stay due to change of employer would be filed in absence of this provision.<sup>146</sup> With this portability provision, we estimate that 444 Forms I-129 for extension of stay due to change of employer would be filed.<sup>147</sup> This difference results in 141 additional Forms I-129 as a result of this provision.<sup>148</sup>

<sup>144</sup> USCIS, Office of Performance and Quality, Data pulled on December 6, 2021.

<sup>145</sup> Calculation: 1,113 Form I-129 filed for extension of stay due to change of employer / 7,208 Form I-129 filed for new employment = 15.4 percent.

<sup>146</sup> Calculation: 2,881 Form I-129 H-2B petitions filed for new employment \* 10.5 percent = 303 estimated number of Form I-129 H-2B petitions filed for extension of stay due to change of employer, no portability provision.

<sup>147</sup> Calculation: 2,881 Form I-129 H-2B petitions filed for new employment \* 15.4 percent = 444 estimated number of Form I-129 H-2B petitions filed for extension of stay due to change of employer, with a portability provision.

<sup>148</sup> Calculation: 444 estimated number of Form I-129 H-2B petitions filed for extension of stay due to change of employer, with a portability provision - 303 estimated number of Form I-129 H-2B petitions filed for extension of stay due to change of employer, no portability provision = 141 Form I-129 H-2B petition increase as a result of portability provision.

*Population affected by the audits*

DHS and DOL each intend to conduct 250 audits of employers hiring H-2B workers under this time-limited FY 2022 H-2B supplemental cap rule. The determination of which employers are audited will be done at the discretion of the Departments, though the agencies will coordinate so that no employer is audited by both DOL and DHS. Therefore, a total of 500 audits on employers that petition for H-2B workers under this TFR will be conducted by the Federal Government.

*Population expected to familiarize themselves with this rule*

DHS expects the population that employers with approved, pending, or projected Applications for Temporary Employment Certification will need to familiarize themselves with this rule; an estimated 2,881 employers. We expect familiarization with the rule will be performed by a HR specialist, in-house lawyer, or outsourced lawyer, and this will be done at the same rate as petitioners who file a Form G-28; an estimated 44.43 percent performed by lawyers. Therefore we estimate that 1,280 lawyers will incur familiarization costs and 1,601 HR specialists will incur familiarization costs.<sup>149</sup>

## **Cost-Benefit Analysis**

The provisions of this rule require the submission of a Form I-129 H-2B petition. The costs for this form include filing costs and the opportunity cost of time to complete and submit the form. The current filing fee for Form I-129 is \$460 and employers filing H-2B petitions must submit an additional fee of \$150.<sup>150</sup> The total estimated cost from filing fees for H-2B petitions using Form I-129 is \$610.<sup>151</sup> The estimated time to complete and file Form I-129 for H-2B

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<sup>149</sup> Calculation for lawyers: 2,881 approved, pending, and projected applicants \* 44.43 percent represents by a lawyer = 1,280 (rounded) represented by a lawyer.

Calculation for HR specialists: 2,881 approved, pending, and projected applicants – 1,280 represented by a lawyer = 1,601 represented by a HR specialist

<sup>150</sup> See Form I-129 instructions at <https://www.uscis.gov/i-129> (accessed December 1, 2021). See also 8 USC 1184(c)(13).

<sup>151</sup> Calculation: \$460 current filing fee for Form I-129 + \$150 additional filing fee for employers filing H-2B petitions = \$610 total estimated filing fees for H-2B petitions using Form I-129.

classification is 4.34 hours.<sup>152</sup> The petition must be filed by a U.S. employer, a U.S. agent, or a foreign employer filing through the U.S. agent. DHS estimates that 44.43 percent of Form I-129 H-2B petitions will be filed by an in-house or outsourced lawyer, and the remainder (55.57 percent) will be filed by an HR specialist or equivalent occupation. DHS presents estimated costs for HR specialists filing Form I-129 petitions and an estimated range of costs for in-house lawyers or outsourced lawyers filing Form I-129 petitions.

To estimate the total opportunity cost of time to HR specialists who complete and file Form I-129, DHS uses the mean hourly wage rate of HR specialists of \$33.38 as the base wage rate.<sup>153</sup> If petitioners hire an in-house or outsourced lawyer to file Form I-129 on their behalf, DHS uses the mean hourly wage rate of \$71.59 as the base wage rate.<sup>154</sup> Using the most recent Bureau of Labor Statistics (BLS) data, DHS calculated a benefits-to-wage multiplier of 1.45 to estimate the full wages to include benefits such as paid leave, insurance, and retirement.<sup>155</sup> DHS multiplied the average hourly U.S. wage rate for HR specialists and for in-house lawyers by the benefits-to-wage multiplier of 1.45 to estimate the full cost of employee wages. The total compensation for an HR specialist is \$48.40 per hour, and the total compensation for an in-house lawyer is \$103.81 per hour.<sup>156</sup> In addition, DHS recognizes that an entity may not have in-house lawyers and seek outside counsel to complete and file Form I-129 on behalf of the petitioner. Therefore, DHS presents a second wage rate for lawyers labeled as outsourced lawyers. DHS

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<sup>152</sup> The public reporting burden for this form is 2.34 hours for Form I-129 and an additional 2.00 hours for H Classification Supplement, totaling 4.34 hours. See Form I-129 instructions at <https://www.uscis.gov/i-129> (accessed December 1, 2021).

<sup>153</sup> U.S. Department of Labor, Bureau of Labor Statistics, “May 2020 National Occupational Employment and Wage Statistics” Human Resources Specialist (13-1071), Mean Hourly Wage, available at [https://www.bls.gov/oes/2020/may/oes\\_nat.htm#13-0000](https://www.bls.gov/oes/2020/may/oes_nat.htm#13-0000) (accessed December 1, 2021).

<sup>154</sup> U.S. Department of Labor, Bureau of Labor Statistics. “May 2020 National Occupational Employment and Wage Estimates” Lawyers (23-1011), Mean Hourly Wage, available at [https://www.bls.gov/oes/2020/may/oes\\_nat.htm#23-0000](https://www.bls.gov/oes/2020/may/oes_nat.htm#23-0000) (accessed December 1, 2021).

<sup>155</sup> Calculation: \$38.91 mean Total Employee Compensation per hour for civilian workers / \$26.85 mean Wages and Salaries per hour for civilian workers = 1.45 benefits-to-wage multiplier. See Economic News Release, Bureau of Labor Statistics, U.S. Department of Labor, Employer Costs for Employee Compensation – June 2021 Table 1. Employer Costs for Employee Compensation by ownership, Civilian workers, available at [https://www.bls.gov/news.release/archives/ecec\\_09162021.pdf](https://www.bls.gov/news.release/archives/ecec_09162021.pdf) (accessed December 1, 2021).

<sup>156</sup> Calculation for the total wage of an HR specialist:  $\$33.38 \times 1.45 = \$48.40$  (rounded). Calculation for the total wage of an in-house lawyer:  $\$71.59 \times 1.45 = \$103.81$  (rounded).

recognizes that the wages for outsourced lawyers may be much higher than in-house lawyers and therefore uses a higher compensation-to-wage multiplier of 2.5 for outsourced lawyers.<sup>157</sup> DHS estimates the total compensation for an outsourced lawyer is \$178.98 per hour.<sup>158</sup> If a lawyer submits Form I-129 on behalf of the petitioner, Form G-28 must accompany the Form I-129 petition.<sup>159</sup> DHS estimates the time burden to complete and submit Form G-28 for a lawyer is 50 minutes (0.83 hour, rounded).<sup>160</sup> For this analysis, DHS adds the time to complete Form G-28 to the opportunity cost of time to lawyers for filing Form I-129 on behalf of a petitioner. This results in a time burden of 5.17 hours for in-house lawyers and outsourced lawyers to complete Form G-28 and Form I-129.<sup>161</sup> Therefore, the total opportunity cost of time per petition for an HR specialist to complete and file Form I-129 is approximately \$210.06, for an in-house lawyer to complete and file Forms I-129 and G-28 is about \$536.70, and for an outsourced lawyer to complete and file is approximately \$925.33.<sup>162</sup> The total cost, including filing fees and opportunity costs of time, per petitioner to file Form I-129 is approximately \$820.06 if HR specialists file, \$1,146.70 if an in-house lawyer files, and \$1,535.33 if an outsourced lawyer files the form.<sup>163</sup>

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<sup>157</sup> The DHS ICE “Safe-Harbor Procedures for Employers Who Receive a No-Match Letter” used a multiplier of 2.5 to convert in-house lawyer wages to the cost of outsourced lawyer based on information received in public comment to that rule. We believe the explanation and methodology used in the Final Small Entity Impact Analysis remains sound for using 2.5 as a multiplier for outsourced labor wages in this rule, see page G-4 [September 1, 2015] [<https://www.regulations.gov/document/ICEB-2006-0004-0921>]. Also see “Exercise of Time-Limited Authority To Increase the Fiscal Year 2021 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers,” May 25, 2021, 86 FR 28198. Available at <https://www.regulations.gov/document/USCIS-2021-0007-0001>.

<sup>158</sup> Calculation: Average hourly wage rate of lawyers x benefits-to-wage multiplier for outsourced lawyer = \$71.59 x 2.5 = \$178.98 (rounded).

<sup>159</sup> USCIS, Filing Your Form G-28, <https://www.uscis.gov/forms/filing-your-form-g-28> (accessed December 1, 2021).

<sup>160</sup> USCIS, G-28, Notice of Entry of Appearance as Attorney or Accredited Representative Instructions. See <https://www.uscis.gov/g-28>.

<sup>161</sup> Calculation: 0.83 hours to file Form G-28 + 4.34 hours to file Form I-129 = 5.17 hours to file both forms.

<sup>162</sup> Calculation if an HR specialist files Form I-129: \$48.40 x 4.34 hours = \$210.06 (rounded).

Calculation if an in-house lawyer files Forms I-129 and G-28: \$103.81 x 5.17 hours = \$536.70 (rounded).

Calculation if an outsourced lawyer files Forms I-129 and G-28: \$178.98 x 5.17 hours = \$925.33 (rounded).

<sup>163</sup> Calculation if an HR specialist files Form I-129 and filing fee: \$210.06 opportunity cost of time + \$610 in filing fees = \$820.06.

Calculation if an in-house lawyer files Forms I-129, G-28, and filing fee: \$536.70 opportunity cost of time + \$610 in filing fees = \$1,146.70.

Calculation if outsourced lawyer files Forms I-129, G-28 and filing fee: \$925.33 opportunity cost of time + \$610 in filing fees = \$1,535.33.

### *Cost to petitioners*

As mentioned in *Section 3*, the estimated population impacted by this rule is 1,226 eligible petitioners who are projected to apply for the additional 20,000 H-2B visas for the first half of FY 2022, with 6,500 of the additional visas reserved for employers that will petition for workers who are nationals of the Northern Triangle countries and Haiti, who are exempt from the returning worker requirement.

### Costs to petitioners to file Form I-129 and Form G-28

As discussed above, DHS estimates that an additional 681 petitions will be filed by HR specialists using Form I-129 and an additional 545 petitions will be filed by lawyers using Form I-129 and Form G-28. DHS estimates the total cost to file Form I-129 petitions if filed by HR specialists is \$448,461 (rounded).<sup>164</sup> DHS estimates total cost to file Form I-129 petitions and Form G-28 if filed by lawyers will range from \$624,952 (rounded) if only in-house lawyers file these forms to \$836,755 (rounded) if only outsourced lawyers file them.<sup>165</sup> Therefore, the estimated total cost to file Form I-129 and Form G-28 range from \$1,183,413 and \$1,395,216.<sup>166</sup>

### Costs to file Form I-907

Employers may use Form I-907 to request premium processing of Form I-129 petitions for H-2B visas. The filing fee for Form I-907 for H-2B petitions is \$1,500 and the time burden for completing the form is 35 minutes (0.58 hour).<sup>167</sup> Using the wage rates established previously, the opportunity cost of time to file Form I-907 is approximately \$28.07 for an HR

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<sup>164</sup> Calculation: \$820.06 opportunity costs for HR specialist plus filing fees \* 681 Form I-129 filed by HR specialists = \$558,461 (rounded) total cost of Form I-129 filed by HR specialists.

<sup>165</sup> Calculation: \$1,146.70 opportunity costs for in-house lawyers plus filing fees \* 545 Form I-129 and Form G-28 filed by in-house lawyers = \$624,952 (rounded) total cost of Form I-129 and Form G-28 filed by in-house lawyers. Calculation: \$1,535.33 opportunity costs for outsourced lawyers plus filing fees \* 545 Form I-129 and Form G-28 filed by outsourced lawyers = \$836,755 (rounded) total cost of Form I-129 and Form G-28 filed by outsourced lawyers.

<sup>166</sup> Calculation: \$558,461 total cost of Form I-129 filed by HR specialists + \$624,952 total cost of Form I-129 and Form G-28 filed by in-house lawyers = \$1,183,413 estimated total costs to file Form I-129 and G-28. Calculation: \$558,461 total cost of Form I-129 filed by HR specialists + \$836,755 total cost of Form I-129 and G-28 filed by outsourced lawyers = \$1,395,216 estimated total costs to file Form I-129 and G-28.

<sup>167</sup> See Form I-907 instructions at <https://www.uscis.gov/i-907> (accessed December 1, 2021).

specialist, \$60.21 for an in-house lawyer, and \$103.81 for an outsourced lawyer.<sup>168</sup> Therefore, the total filing cost to complete and submit Form I-907 per petitioner is approximately \$1,528.07 for HR specialists, \$1,560.21 for in-house lawyers, and \$1,603.81 for outsourced lawyers.<sup>169</sup>

As discussed above, DHS estimates that an additional 638 Form I-907 will be filed by HR specialists and an additional 510 Form I-907 will be filed lawyers. DHS estimates the total cost of Form I-907 filed by HR specialists is about \$974,909 (rounded).<sup>170</sup> DHS estimates total cost to file Form I-907 filed by lawyers range from about \$795,707 (rounded) for only in-house lawyers to \$817,943 (rounded) for only outsourced lawyers.<sup>171</sup> The estimated total cost to file Form I-907 range from \$1,770,616 and \$1,792,852.<sup>172</sup>

#### Cost to file Form ETA-9142-B-CAA-5

Form ETA-9142-B-CAA-5 is an attestation form that includes recruiting requirements, the irreparable harm standard, and document retention obligations. DOL estimates the time burden for completing and signing the form is 0.25 hour, 0.25 hours for retaining records, and 0.5 hours to comply with the returning workers' attestation, for a total time burden of 1 hour. Using the total compensation per hour for an HR specialist (\$48.40), the opportunity cost of time

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<sup>168</sup> Calculation for opportunity cost of time if an HR specialist files Form I-907:  $\$48.40 \times 0.58 \text{ hours} = \$28.07$ (rounded).

Calculation for opportunity cost of time if an in-house lawyer files Form I-907:  $\$103.81 \times 0.58 \text{ hours} = \$60.21$ (rounded).

Calculation for opportunity cost of time if an outsourced lawyer files Form I-907:  $\$178.98 \times 0.58 \text{ hours} = \$103.81$ (rounded).

<sup>169</sup> Calculation if an HR specialist files:  $\$28.07 + \$1,500 = \$1,528.07$ .

Calculation if an in-house lawyer files:  $\$60.21 + \$1,500 = \$1,560.21$ .

Calculation if outsourced lawyer files:  $\$103.81 + \$1,500 = \$1,603.81$ .

<sup>170</sup> Calculation:  $\$1,528.07$  opportunity costs for HR specialist plus filing fees \* 638 Form I-907 filed by HR specialists = \$974,909 (rounded) total cost of Form I-907 filed by HR specialists.

<sup>171</sup> Calculation:  $\$1,560.21$  opportunity costs for in-house lawyers plus filing fees \* 510 Form I-907 filed by in-house lawyers = \$795,707 (rounded) total cost of Form I-907 filed by in-house lawyers.

Calculation:  $\$1,603.81$  opportunity costs for outsourced lawyers plus filing fees \* 510 Form I-907 filed by outsourced lawyers = \$817,943 (rounded) total cost of Form I-907 filed by outsourced lawyers.

<sup>172</sup> Calculation:  $\$974,909$  total cost of Form I-907 filed by HR specialists +  $\$795,707$  total cost of Form I-907 filed by in-house lawyers = \$1,770,616 estimated total costs to file Form I-907.

Calculation:  $\$974,909$  total cost of Form I-129 filed by HR specialists +  $\$817,943$  total cost of Form I-907 filed by outsourced lawyers = \$1,792,852 estimated total costs to file Form I-907.

for an HR specialist to complete the attestation form, notify third parties, and retain records relating to the returning worker requirements is approximately \$48.40.<sup>173</sup>

Additionally, the form requires that petitioners assess and document supporting evidence for meeting the irreparable harm standard, and retain those documents and records, which we assume will require the resources of a financial analyst (or another equivalent occupation). Using the same methodology previously described for wages, the total compensation per hour for a financial analyst is \$67.37.<sup>174</sup> DOL estimates the time burden for these tasks is at least 4 hours, and 1 hour for gathering and retaining documents and records. Therefore, the total opportunity cost of time for a financial analyst to assess, document, and retain supporting evidence is approximately \$336.85.<sup>175</sup>

As discussed previously, DHS believes that the estimated 1,226 remaining certifications for the first half of FY 2022 would include potential employers that might request to employ H-2B workers under this rule. This number of certifications is a reasonable proxy for the number of employers that may need to review and sign the attestation. Using this estimate for the total number of certifications, we estimate the opportunity cost of time for completing the attestation for HR specialists is approximately \$59,338 (rounded) and for financial analysts is about \$412,978 (rounded).<sup>176</sup> The total cost is estimated to be approximately \$472,316.<sup>177</sup>

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<sup>173</sup> Calculation: \$48.40 opportunity cost of time for HR specialist × 1-hour time burden for the new attestation form and notifying third parties and retaining records related to the returning worker requirements = \$48.40.

<sup>174</sup> Calculation: \$46.46 (average per hour wage for a financial analyst, based on BLS wages) × 1.45 (benefits-to-wage multiplier) = \$67.37. U.S. Department of Labor, Bureau of Labor Statistics, “May 2020 National Occupational Employment and Wage Statistics” Financial and Investment Analysts, Financial Risk Specialists, and Financial Specialists, All Other (13-2098): [https://www.bls.gov/oes/2020/may/oes\\_nat.htm#13-0000](https://www.bls.gov/oes/2020/may/oes_nat.htm#13-0000) (accessed April 9, 2021).

<sup>175</sup> Calculation: \$67.37 (fully loaded hourly wage for a financial analyst) × 5 hours (time burden for assessing, documenting and retention of supporting evidence demonstrating the employer is suffering irreparable harm or will suffer impending irreparable harm) = \$336.85.

<sup>176</sup> Calculations: Cost for HR Specialists: \$48.40 opportunity cost of time for an HR specialist to comply with attestation requirements × 1,226 estimated additional petitions = \$59,338 (rounded) total cost for HR specialists to comply with attestation requirements.

Calculation: \$336.85 opportunity cost of time for a financial analyst to comply with attestation requirements × 1,226 estimated additional petitions = \$412,978 (rounded) for financial analysts to comply with attestation requirements

<sup>177</sup> Calculation: \$59,338 total cost for HR specialist to comply with attestation requirement + \$412,978 total cost for financial analysts to comply with attestation requirements = \$472,316 total cost to comply with attestation requirements.

## Cost to conduct recruitment

An employer that files Form ETA-9142B-CAA-5 and the I-129 petition 45 or more days after the certified start date of work must conduct additional recruitment of U.S. workers. This consists of placing a new job order with the State Workforce Agency, contacting the American Job Center, and contacting laid-off workers. Employers must place a new job order for the job opportunity with the State Workforce Agency (SWA).

Employers are required to make reasonable efforts to contact, by mail or other effective means, their former U.S. workers, including those workers who were furloughed and laid off, beginning January 1, 2020. Employers must also disclose the terms of the job order to these workers as required by the rule.

During the period of time the SWA is actively circulating the job order, employers must contact, by email or other available electronic means, the nearest local American Job Center (AJC) in order to request staff assistance advertising and recruiting qualified U.S. workers for the job opportunity, and to provide to the AJC the unique identification number associated with the job order placed with the SWA.

Finally, the employer is required to provide a copy of the job order to the bargaining representative for its employees in the occupation and area of intended employment, consistent with 20 CFR 655.45(a), or if there is no bargaining representative, post the job order in the places and manner described in 20 CFR 655.45(b).

DOL estimates the total time burden for activities related to conducting recruitment is 3 hours. Assuming this work will be done by an HR specialist or an equivalent occupation, the estimated cost to each petitioner is approximately \$145.20.<sup>178</sup> Using the 1,226 as the estimated number of petitioners, the estimated total cost of this provision is approximately \$178,015

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<sup>178</sup> Calculation: \$48.40 hourly opportunity cost of time for an HR specialist \* 3-hour time burden = \$145.20 per petitioner cost to conduct additional recruitment.



(rounded).<sup>179</sup> It is possible that if U.S. employees apply for these positions, H-2B employers may incur some costs associated with reviewing applications, interviewing, vetting, and hiring applicants who are referred to H-2B employers by the recruiting activities required by this rule. However, DOL is unable to quantify the impact.

#### Cost of the COVID Protection provision

Employers must notify employees, in a language understood by the worker as necessary or reasonable, that all persons in the United States, including nonimmigrants, have equal access to COVID-19 vaccines and vaccine distribution sites. We assume that employers will provide a printed notification to inform their employees and that printing and posting the notification can be done during the normal course of business. Given that the regulatory text associated with this provision is less than 150 words, we expect that an employer would only need to post a one-page notification. The printing cost associated with posting the notification (assuming that the notification is written) is \$0.49 per posting.<sup>180</sup> The estimated total cost to petitioners to print copies is approximately \$601 (rounded).<sup>181</sup> Print costs may be higher if employers have to print posters in multiple languages.

#### Cost of the portability provision

Petitioners seeking to hire H-2B nonimmigrants who are currently present in the United States with a valid H-2B visa would need to file a Form I-129 which includes paying the associated fee as discussed above. Also previously discussed, we assume that all employers with an approved TLC (2,881) would be able to file a petition under this provision, and estimate that approximately 141 additional Form I-129 H-2B petitions will be filed as a result of this provision.

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<sup>179</sup> Calculation: 1,226 estimated number of petitioners \* \$145.20 per petitioner cost to conduct additional recruitment = \$178,015 (rounded) total cost to conduct additional recruitment.

<sup>180</sup> Cost to make copies \$0.49. See <https://www.fedex.com/en-us/office/copy-and-print-services.html> (accessed December 6, 2021).

<sup>181</sup> Calculation: \$0.49 per posting \* 1,226 petitioners = \$601 (rounded) cost of notifications copies.

As discussed previously, if a petitioner is represented by a lawyer, the lawyer must file Form G-28; if premium processing is desired, a petitioner must file Form I-907 and pay the associated fee. We expect these actions to be performed by an HR specialist, in-house lawyer, or an outsourced lawyer. Moreover, as previously estimated, we expect that about 44.43 percent of these Form I-129 petitions will be filed by an in-house or outsourced lawyer. Therefore, we expect that 63 of these petitions will be filed by a lawyer and the remaining 78 will be filed by a HR specialist. As previously discussed, the estimated cost to file a Form I-129 H-2B petition is \$820.06 for an HR specialist; and the estimated cost to file a Form I-129 H-2B petition with accompanying Form G-28 is approximately \$1,146.70 for an in-house lawyer and \$1,535.33 for an outsourced lawyer. Therefore, we estimate the cost of the additional Forms I-129 from the portability provision for HR specialists is \$63,965.<sup>182</sup> The estimated cost of the additional Forms I-129 accompanied by Forms G-28 from the portability provision for lawyers is \$72,242 if filed by in-house lawyers and \$96,726 if filed by outsourced lawyers.<sup>183</sup>

Previously in this analysis, we estimated that about 93.67 percent of Form I-129 H-2B petitions are filed with Form I-907 for premium processing. As a result of this provision, we expect that an additional 132 Forms I-907 will be filed.<sup>184</sup> We expect 59 of those Forms I-907 will be filed by a lawyer and the remaining 73 will be filed by an HR specialist.<sup>185</sup> As previously discussed, the estimated cost to file a Form I-907 is \$1,528.07 for an HR specialist; and the estimated cost to file a Form I-907 is approximately \$1,560.21 for an in-house lawyer and \$1,603.81 for an outsourced lawyer. The estimated total cost of the additional Forms I-907 if

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<sup>182</sup> Calculation: \$820.06 estimated cost for an HR specialist to file a Form I-129 H-2B petition \* 78 petitions = \$63,965.

<sup>183</sup> Calculation for an in-house lawyer: \$1,146.70 estimated cost for an in-house lawyer to file a Form I-129 H-2B petition and accompanying Form G-28 \* 63 petitions = \$72,242 (rounded).  
Calculation for an outsourced lawyer: \$1,535.33 estimated cost for an outsourced lawyer to file a Form I-129 H-2B petition and accompanying Form G-28 \* 63 petitions = \$96,726 (rounded).

<sup>184</sup> Calculation: 144 estimated additional Form I-129 H-2B petitions \* 93.67 percent accompanied by Form I-907 = 132 (rounded) additional Form I-907.

<sup>185</sup> Calculation: 132 additional Form I-907 \* 44.43 percent filed by a lawyer = 59 (rounded) Form I-907 filed by a lawyer. 132 Form I-907 – 59 Form I-907 filed by a lawyer = 73 Form I-907 filed by a HR specialist.

HR specialists file is \$111,549.<sup>186</sup> The estimated total cost of the additional Forms I-907 is \$92,052 if filed by in-house lawyers and \$94,625 if filed by outsourced lawyers.<sup>187</sup>

The estimated total cost of this provision ranges from \$339,808 to \$366,865 depending on what share of the forms are filed by in-house or outsourced lawyers.<sup>188</sup>

#### Cost of audits to petitioners

DHS and DOL will each conduct audits on 250 separate employers of H-2B workers hired under this supplemental cap, for a total of 500 employers. Employers will need to provide requested information to comply with the audit. The expected time burden to comply with audits is estimated to be 12 hours.<sup>189</sup> We expect that providing these documents will be accomplished by an HR specialist or equivalent occupation. Given an hourly opportunity cost of time of \$48.40, the estimated cost of complying with audits is \$580.80 per audited employer.<sup>190</sup> Therefore, the total estimated cost to employers to comply with audits is \$290,400.<sup>191</sup>

#### Familiarization costs

We expect that petitioners or their representatives would need to read and understand this rule if they seek to take advantage of the supplemental cap. As a result we expect this rule would impose one-time familiarization costs associated with reading and understanding this rule. As shown previously, we estimate that approximately 2,881 petitioners may take advantage of the

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<sup>186</sup> Calculation: \$1,528.07 for a HR specialist to file a Form I-907 \* 73 forms = \$111,549 (rounded).

<sup>187</sup> Calculation for an in-house lawyer: \$1,560.21 for an in-house lawyer to file a Form I-907 \* 59 forms = \$92,052 (rounded).

Calculation for an outsourced lawyer: \$1,603.81 for an outsourced lawyer to file a Form I-907 \* 59 forms = \$94,625 (rounded).

<sup>188</sup> Calculation for HR specialists and in-house lawyers: \$63,965 for HR specialists to file Form I-129 H-2B petitions + \$72,242 for in-house lawyers to file Form I-129 and the accompanying Form G-28 + \$111,549 for HR specialists to file Form I-907 + \$92,052 for in-house lawyers to file Form I-907 = \$339,808.

Calculation for HR specialists and outsourced lawyers: \$63,965 for HR specialists to file Form I-129 H-2B petitions + \$96,726 for outsourced lawyers to file Form I-129 and the accompanying Form G-28 + \$111,549 for HR specialists to file Form I-907 + \$94,625 for outsourced lawyers to file Form I-907 = \$366,865.

<sup>189</sup> The number in hours for audits was provided by the USCIS, Service Center Operations.

<sup>190</sup> Calculation: \$48.40 hourly opportunity cost of time for an HR specialist \* 12 hours to comply with an audit = \$580.80 per audited employer.

<sup>191</sup> Calculation: 500 audited employers \* \$580.80 opportunity cost of time to comply with an audit = \$290,400.

provisions of this rule, and that 1,280 of these petitioners are expected to be represented by a lawyer and 1,601 are expected to be represented by a HR representative.

To estimate the cost of rule familiarization, we estimate the time it will take to read and understand the rule by assuming a reading speed of 238 words per minute.<sup>192</sup> This rule has approximately 38,000 words. Using a reading speed of 238 words per minute, DHS estimates it will take approximately 2.7 hours to read and become familiar with this rule.<sup>193</sup>

The estimated hourly total compensation for a HR specialist, in-house lawyer, and outsourced lawyer are \$48.40, \$103.81, and \$178.98 respectively. The estimated opportunity cost of time for each of these filers to familiarize themselves with the rule are \$130.68, \$280.29, and \$483.25 respectively.<sup>194</sup> The estimated total opportunity cost of time for 1,601 HR specialists to familiarize themselves with this rule is approximately \$209,219. The estimated total opportunity cost of time for 1,280 lawyers to familiarize themselves with this rule is approximately \$358,767 if they are all in-house lawyers and \$618,555 if they are all outsourced lawyers. The estimated total opportunity costs of time for petitioners or their representatives to familiarize themselves with this rule ranges from \$567,986 to \$827,774.

#### Estimated Total Costs to Petitioners

The monetized costs of this rule come from filing and complying with Form I-129, Form G-28, Form I-907, and Form ETA-9142-B-CAA-5, as well as contacting and refreshing recruitment efforts, posting notifications, filings to obtain a porting worker, and complying with audits. The estimated total cost to file Form I-129 and an accompanying Form G-28 ranges from \$1,183,413 to \$1,395,216, depending on the filer. The estimated total cost of filing Form I-907 ranges from \$1,770,616 to \$1,792,852, depending on the filer. The estimated total cost of filing

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<sup>192</sup> Brysbaert, Marc (2019, April 12). How many words do we read per minute? A review and meta-analysis of reading rate. <https://doi.org/10.31234/osf.io/xynwg> (accessed July 30, 2021). We use the average speed for silent reading of English nonfiction by adults.

<sup>193</sup> Calculation: 32,000 words / 238 words per minute = 134 (rounded) minutes. 134 minutes / 60 minutes per hour = 2.2 (rounded) hours.

<sup>194</sup> Calculation: Total respective hourly compensation (HR \$48.40, In-house Lawyer \$103.81, or Outsourced Lawyer \$178.98)\*2.2 hours.

and complying with Form ETA-9142-B-CAA-5 is about \$472,316. The estimated total cost of conducting additional recruitment is about \$178,015. The estimated total cost of the COVID-19 protection provision is approximately \$601. The estimated cost of the portability provision ranges from \$339,808 to \$366,865, depending on the filer. The estimated total cost for employers to comply with audits is \$290,400. The estimated total costs for petitioners or their representatives to familiarize themselves with this rule ranges from \$567,986 to \$827,774, depending on the filer. The total estimated cost to petitioners ranges from \$4,803,155 to \$5,324,039, depending on the filer.<sup>195</sup>

#### *Cost to the Federal Government*

The INA provides USCIS with the authority for the collection of fees at a level that will ensure recovery of the full costs of providing adjudication and naturalization services, including administrative costs, and services provided without charge to certain applicants and petitioners.<sup>196</sup> DHS notes USCIS establishes its fees by assigning costs to an adjudication based on its relative adjudication burden and use of USCIS resources. Fees are established at an amount that is necessary to recover these assigned costs such as clerical, officers, and managerial salaries and benefits, plus an amount to recover unassigned overhead (for example, facility rent, IT equipment and systems among other expenses) and immigration benefits provided without a fee charge. Consequently, since USCIS immigration fees are based on resource expenditures related to the benefit in question, USCIS uses the fee associated with an information collection as a reasonable measure of the collection's costs to USCIS. DHS anticipates some additional costs in adjudicating the additional petitions submitted because of the increase in cap limitation for H-2B visas. However, DHS expects these costs to be recovered by the fees associated with the

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<sup>195</sup> Calculation of lower range: \$1,183,413 + \$1,770,616 + \$472,316 + \$178,015 + \$339,808 + \$601 + \$290,400 + \$567,986 = \$4,803,155.

Calculation of upper range: \$1,395,216 + \$1,792,852 + \$472,316 + \$178,015 + \$366,865 + \$601 + \$290,400 + \$827,774 = \$5,324,039.

<sup>196</sup> See INA section 286(m), 8 U.S.C. 1356(m).

forms, which have been accounted for under costs to petitioners and serve as proxy of the costs to the agency to adjudicate these forms.

Both DOL and DHS intend to conduct a significant number of audits during the period of temporary need to verify compliance with H-2B program requirements, including the irreparable harm standard as well as other key worker protection provisions implemented through this rule. While most USCIS activities are funded through fees and DOL is funded through appropriations, it is expected that both agencies will be able to shift resources to be able to conduct these audits without incurring additional costs. As previously mentioned, the agencies will conduct a total of 500 audits and each audit is expected to take 12 hours. This results in a total time burden of 6,000 hours.<sup>197</sup> USCIS anticipates that a Federal employee at a GS-13 Step 5 salary will typically conduct these audits for each agency. The base pay for a GS-13 Step 5 in the Washington, DC locality area is \$117,516.<sup>198</sup> The hourly wage for this salary is approximately \$56.50.<sup>199</sup> To estimate the total hourly compensation for these positions, we multiply the hourly wage (\$56.50) by the Federal benefits to wage multiplier of 1.38.<sup>200</sup> This results in an hourly opportunity cost of time of \$77.97 for GS 13-5 Federal employees in the Washington, DC locality pay area.<sup>201</sup> The total opportunity costs of time for Federal workers to conduct audits is estimated to be \$467,820.<sup>202</sup>

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<sup>197</sup> Calculation: 12 hours to conduct an audit \* 500 audits = 6,000 total hours to conduct audits.

<sup>198</sup> U.S. Office of Personnel Management, Pay and Leave, Salaries and Wages, For the Locality Pay area of Washington-Baltimore-Arlington, DC-MD-VA-WV-PA, 2021, <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/21Tables/html/DCB.aspx> (last accessed December 6, 2021).

<sup>199</sup> Calculation: \$117,516 GS 13-5 Washington, DC locality annual salary / 2080 annual hours = \$56.50 (rounded).

<sup>200</sup> Calculation: \$1,717,321 Full-time Permanent Salaries + \$656,748 Civilian Personnel Benefits = \$2,374,069 Compensation.

\$2,374,069 Compensation / \$1,717,321 Full-time Permanent Salaries = 1.38 (rounded) Federal employee benefits to wage ratio.

[https://www.uscis.gov/sites/default/files/document/reports/USCIS\\_FY\\_2021\\_Budget\\_Overview.pdf](https://www.uscis.gov/sites/default/files/document/reports/USCIS_FY_2021_Budget_Overview.pdf) (last accessed December 6, 2021).

<sup>201</sup> Calculation: \$56.50 hourly wage for a GS 13-5 in the Washington, DC locality area \* 1.38 Federal employee benefits to wage ratio = \$77.97 hourly opportunity cost of time for a GS 13-5 federal employee in the Washington, DC locality area.

<sup>202</sup> Calculation: 6,000 hours to conduct audits \* \$77.97 hourly opportunity cost of time = \$467,820 total opportunity costs of time for Federal employees to conduct audits.

#### *Benefits to Petitioners*

The Departments assume that employers will incur the costs of this rule and other costs associated with hiring H-2B workers if the expected benefits of those workers exceed the expected costs. We assume that employers expect some level of net benefit from being able to hire additional H-2B workers. However, the Departments do not collect or require data from H-2B employers on the profits from hiring these additional workers to estimate this increase in net benefits.

The inability to access H-2B workers for some entities is currently causing irreparable harm or will cause their businesses to suffer irreparable harm in the near future. Temporarily increasing the number of available H-2B visas for this fiscal year may result in a cost savings, because it will allow some businesses to hire the additional labor resources necessary to avoid such harm. Preventing such harm may ultimately preserve the jobs of other employees (including U.S. workers) at that establishment. Additionally, returning workers are likely to be very familiar with the H-2B process and requirements, and may be positioned to begin work more expeditiously with these employers. Moreover, employers may already be familiar with returning workers as they have trained, vetted, and worked with some of these returning workers in past years. As such, limiting the supplemental visas to returning workers would assist employers that are suffering irreparable harm or will suffer impending irreparable harm.

#### *Benefits to Workers*

The Departments assume that workers will only incur the costs of this rule and other costs associated with obtaining a H-2B position if the expected benefits of that position exceed the expected costs. We assume that H-2B workers expect some level of net benefit from being able to work for H-2B employers. However, the Departments do not have sufficient data to estimate this increase in net benefits and lack the necessary resources to investigate this in a timely manner. This rule is not expected to impact wages because DOL prevailing wage regulations apply to all H-2B workers covered by this rule. Additionally, the RIA shows that

employers incur costs in conducting additional recruitment of U.S. workers and attesting to irreparable harm from current labor shortfall. These costs suggest employers are not taking advantage of a large supply of foreign labor at the expense of domestic workers.

The existence of this rule will benefit the workers who receive H-2B visas. *See* Arnold Brodbeck et al., Seasonal Migrant Labor in the Forest Industry of the United States: The Impact of H-2B Employment on Guatemalan Livelihoods, 31 *Society & Natural Resources* 1012 (2018), and in particular this finding: “Participation in the H-2B guest worker program has become a vital part of the livelihood strategies of rural Guatemalan families and has had a positive impact on the quality of life in the communities where they live. Migrant workers who were landless, lived in isolated rural areas, had few economic opportunities, and who had limited access to education or adequate health care, now are investing in small trucks, building roads, schools, and homes, and providing employment for others in their home communities. . . . The impact has been transformative and positive.”

Some provisions of this rule will benefit such workers in particular ways. The portability provision of this rule will allow nonimmigrants with valid H-2B visas who are present in the United States to transfer to a new employer more quickly and potentially extend their stay in the United States and, therefore, earn additional wages. Importantly, the rule will also increase information employees have about equal access to COVID-19 vaccinations and vaccine distribution sites. DHS recognizes that some of the effects of these provisions may occur beyond the borders of the United States. The current analysis does not seek to quantify or monetize costs or benefits that occur outside of the United States.

Note as well that U.S. workers will benefit in multiple ways. For example, the additional round of recruitment and U.S. worker referrals required by the provisions of this rule will ensure that a U.S. worker who is willing and able to fill the position is not displaced by a nonimmigrant worker. As noted, the avoidance of current or impending irreparable harm made possible



through the granting of supplemental visas in this rule could ensure that U.S. workers—who otherwise may be vulnerable if H-2B workers were not given visas—do not lose their jobs.

### **C. Regulatory Flexibility Act**

The Regulatory Flexibility Act, 5 U.S.C. 601 et seq. (RFA), imposes certain requirements on Federal agency rules that are subject to the notice and comment requirements of the APA. See 5 U.S.C. 603(a), 604(a). This temporary final rule is exempt from notice and comment requirements for the reasons stated above. Therefore, the requirements of the RFA applicable to final rules, 5 U.S.C. 604, do not apply to this temporary final rule. Accordingly, the Departments are not required to either certify that the temporary final rule would not have a significant economic impact on a substantial number of small entities nor conduct a regulatory flexibility analysis.

### **D. Unfunded Mandates Reform Act of 1995**

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed rule, or final rule for which the agency published a proposed rule that includes any Federal mandate that may result in \$100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. This rule is exempt from the written statement requirement because DHS did not publish a notice of proposed rulemaking for this rule.

In addition, this rule does not exceed the \$100 million expenditure in any 1 year when adjusted for inflation (\$169.8 million in 2020 dollars),<sup>203</sup> and this rulemaking does not contain such a mandate. The requirements of Title II of the Act, therefore, do not apply, and the Departments have not prepared a statement under the Act.

#### **E. Executive Order 13132 (Federalism)**

This rule does not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, 64 FR 43255 (Aug. 4, 1999), this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

#### **F. Executive Order 12988 (Civil Justice Reform)**

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, 61 FR 4729 (Feb. 5, 1996).

#### **G. National Environmental Policy Act**

DHS and its components analyze proposed actions to determine whether the National Environmental Policy Act (NEPA) applies to them and, if so, what degree of analysis is required. DHS Directive (Dir) 023-01 Rev. 01 and Instruction Manual 023-01-001-01 Rev. 01 (Instruction

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<sup>203</sup> See U.S. Bureau of Labor Statistics, *Historical Consumer Price Index for All Urban Consumers (CPI-U): U.S. City Average, All Items*, available at <https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202103.pdf> (last visited December 8, 2021).

Calculation of inflation: 1) Calculate the average monthly CPI-U for the reference year (1995) and the most recent current year available (2020); 2) Subtract reference year CPI-U from current year CPI-U; 3) Divide the difference of the reference year CPI-U and current year CPI-U by the reference year CPI-U; 4) Multiply by 100 = [(Average monthly CPI-U for 2020 – Average monthly CPI-U for 1995) / (Average monthly CPI-U for 1995)] \* 100 = [(258.811– 152.383) / 152.383] \* 100 = (106.428 / 152.383) \* 100 = 0.6984 \* 100 = 69.84 percent = 69.8 percent (rounded).

Calculation of inflation-adjusted value: \$100 million in 1995 dollars \* 1.698 = \$169.8 million in 2020 dollars.

Manual) establish the procedures that DHS and its components use to comply with NEPA and the Council on Environmental Quality (CEQ) regulations for implementing NEPA, 40 CFR parts 1500 through 1508.

The CEQ regulations allow Federal agencies to establish, with CEQ review and concurrence, categories of actions (“categorical exclusions”) which experience has shown do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require an Environmental Assessment (EA) or Environmental Impact Statement (EIS). 40 CFR 1507.3(b)(1)(iii), 1508.4. The Instruction Manual, Appendix A, Table 1 lists Categorical Exclusions that DHS has found to have no such effect. Under DHS NEPA implementing procedures, for an action to be categorically excluded, it must satisfy each of the following three conditions: (1) The entire action clearly fits within one or more of the categorical exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect. Instruction Manual, section V.B.2(a-c).

This rule temporarily amends the regulations implementing the H-2B nonimmigrant visa program to increase the numerical limitation on H-2B nonimmigrant visas for FY 2022 for positions with start dates on or before March 31, 2022 based on the Secretary of Homeland Security’s determination, in consultation with the Secretary of Labor, consistent with the FY 2021 Omnibus and Public laws 117-43 and 117-70. It also allows H-2B beneficiaries who are in the United States to change employers upon the filing of a new H-2B petition and begin to work for the new employer for a period generally not to exceed 60 days before the H-2B petition is approved by USCIS.

DHS has determined that this rule clearly fits within categorical exclusion A3(d) because it interprets or amends a regulation without changing its environmental effect. The amendments to 8 CFR part 214 would authorize up to an additional 20,000 visas for noncitizens who may receive H-2B nonimmigrant visas, of which 13,500 are for returning workers (persons issued H-

2B visas or were otherwise granted H-2B status in Fiscal Years 2019, 2020, or 2021). The proposed amendments would also facilitate H-2B nonimmigrants to move to new employment faster than they could if they had to wait for a petition to be approved. The amendment's operative provisions approving H-2B petitions under the supplemental allocation would effectively terminate after September 30, 2022 for the cap increase, and 180 days from the rule's effective date for the portability provision. DHS believes amending applicable regulations to authorize up to an additional 20,000 H-2B nonimmigrant visas will not result in any meaningful, calculable change in environmental effect with respect to the current H-2B limit or in the context of a current U.S. population exceeding 332,000,000 (maximum temporary increase of 0.0066%).

The amendment to applicable regulations is a stand-alone temporary authorization and not a part of any larger action, and presents no extraordinary circumstances creating the potential for significant environmental effects. Therefore, this action is categorically excluded and no further NEPA analysis is required.

## **H. Congressional Review Act**

The Office of Information and Regulatory Affairs has determined that this temporary final rule is not a "major rule" as defined by the Congressional Review Act, 5 U.S.C. 804(2), and thus is not subject to a 60-day delay in the rule becoming effective. DHS will send this temporary final rule to Congress and to the Comptroller General under the Congressional Review Act, 5 U.S.C. 801 et seq.

## **I. Paperwork Reduction Act**

*Attestation for Employers Seeking to Employ H-2B Nonimmigrants Workers Under Section 105 of Division O of the Consolidated Appropriations Act, 2021 Public Law 116-260, and Public Laws 117-43 and 117-70 Form ETA-9142-B-CAA-5.*

The Paperwork Reduction Act (PRA), 44 U.S.C. 3501 et seq., provides that a Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. DOL has submitted the Information Collection Request (ICR) contained in this rule to OMB and obtained approval of a new form, Form ETA-9142B-CAA-5, using emergency clearance procedures outlined at 5 CFR 1320.13. The Departments note that while DOL submitted the ICR, both DHS and DOL will use the information.

Petitioners will use the new Form ETA-9142B-CAA-5 to make attestations regarding, for example, irreparable harm and the returning worker requirement (unless exempt because the H-2B worker is a national of one of the Northern Triangle countries who is counted against the 6,500 returning worker exemption cap) described above. Petitioners will need to file the attestation with DHS until it announces that the supplemental H-2B cap has been reached. In addition, the petitioner will need to retain all documentation demonstrating compliance with this implementing rule, and must provide it to DHS or DOL in the event of an audit or investigation.

In addition to obtaining immediate emergency approval, DOL is seeking comments on this information collection pursuant to 5 CFR 1320.13. Comments on the information collection must be received by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. This process of engaging the public and other Federal agencies helps ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The PRA provides that a Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by OMB

under the PRA and displays a currently valid OMB Control Number. *See* 44 U.S.C. 3501 *et seq.* In addition, notwithstanding any other provisions of law, no person must generally be subject to a penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

In accordance with the PRA, DOL is affording the public with notice and an opportunity to comment on the new information collection, which is necessary to implement the requirements of this rule. The information collection activities covered under a newly granted OMB Control Number 1205-NEW are required under Public Laws 117-43 and 117-70, on the same terms as Section 105 of Division O of the FY 2021 Omnibus, which provided that “the Secretary of Homeland Security, after consultation with the Secretary of Labor, and upon the determination that the needs of American businesses cannot be satisfied in [FY] 2021 with U.S. workers who are willing, qualified, and able to perform temporary nonagricultural labor,” may increase the total number of noncitizens who may receive an H-2B visa in FY 2021 by not more than the highest number of H-2B nonimmigrants who participated in the H-2B returning worker program in any fiscal year in which returning workers were exempt from the H-2B numerical limitation. As previously discussed in the preamble of this rule, the Secretary of Homeland Security, in consultation with the Secretary of Labor, has decided to increase the numerical limitation on H-2B nonimmigrant visas to authorize the issuance of up to, but not more than, an additional 20,000 visas for FY 2022 for certain H-2B workers with start dates on or before March 31, 2022, for U.S. businesses who attest that they are suffering irreparable harm or will suffer impending irreparable harm. As with the previous supplemental rules, the Secretary has determined that the additional visas will only be available for returning workers, that is workers who were issued H-2B visas or otherwise granted H-2B status in FY 2019, 2020, or 2021, unless the worker is one of the 6,500 nationals of one of the Northern Triangle countries and Haiti who are exempt from the returning worker requirement.

Commenters are encouraged to discuss the following:

- whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- the quality, utility, and clarity of the information to be collected; and
- the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

The aforementioned information collection requirements are summarized as follows:

*Agency:* DOL-ETA.

*Type of Information Collection:* Extension of an existing information collection.

*Title of the Collection:* Attestation for Employers Seeking to Employ H-2B

Nonimmigrants Workers Under Section 105 of Division O of the Consolidated Appropriations Act, 2021 Public Law 116-260, and Public Laws 117-43 and 117-70.

*Agency Form Number:* Form ETA-9142-B-CAA-5.

*Affected Public:* Private Sector—businesses or other for-profits.

*Total Estimated Number of Respondents:* 1,226.

*Average Responses per Year per Respondent:* 1.

*Total Estimated Number of Responses:* 1,226.

*Average Time per Response:* 9 hours per application.

*Total Estimated Annual Time Burden:* **11,034** hours.

*Total Estimated Other Costs Burden:* \$0

*Application for Premium Processing Service, Form I-907*

The Paperwork Reduction Act (PRA), 44 U.S.C. 3501 et seq., provides that a Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. Form I-907, Application for Premium Processing Service, has been approved by OMB and assigned OMB control number 1615-0048. DHS is making no changes to the Form I-907 in connection with this temporary rule implementing the time-limited authority pursuant to Public Laws 117-43 and 117-70, on the same terms as section 105 of Division O, FY 2021 Omnibus, (which expires on September 30, 2022). However, USCIS estimates that this temporary rule may result in approximately 1,280 additional filings of Form I-907 in fiscal year 2022. The current OMB-approved estimate of the number of annual respondents filing a Form I-907 is 319,301. USCIS has determined that the OMB-approved estimate is sufficient to fully encompass the additional respondents who will be filing Form I-907 in connection with this temporary rule, which represents a small fraction of the overall Form I-907 population. Therefore, DHS is not changing the collection instrument or increasing its burden estimates in connection with this temporary rule and is not publishing a notice under the PRA or making revisions to the currently approved burden for OMB control number 1615-0048.

#### **List of Subjects**

##### **8 CFR Part 214**

Administrative practice and procedure, Aliens, Cultural exchange program, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

##### **8 CFR Part 274a**

Administrative practice and procedure, Aliens, Cultural exchange program, Employment, Penalties, Reporting and recordkeeping requirements, Students.



## **20 CFR Part 655**

Administrative practice and procedure, Employment, Employment and training, Enforcement, Foreign workers, Forest and forest products, Fraud, Health professions, Immigration, Labor, Longshore and harbor work, Migrant workers, Nonimmigrant workers, Passports and visas, Penalties, Reporting and recordkeeping requirements, Unemployment, Wages, Working conditions.

## **DEPARTMENT OF HOMELAND SECURITY**

### **8 CFR Chapter I**

For the reasons discussed in the joint preamble, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

#### **PART 214 -- NONIMMIGRANT CLASSES**

1. Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] through January 28, 2025, the authority citation for part 214 continues to read as follows:

**Authority:** 6 U.S.C. 202, 236; 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301-1305, 1357, and 1372; sec. 643, Pub. L. 104-208, 110 Stat. 3009-708; Pub. L. 106-386, 114 Stat. 1477-1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note and 1931 note, respectively; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 115-218, 132 Stat. 1547 (48 U.S.C. 1806).

2. Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] through January 28, 2025, amend § 214.2 by:

- a. Adding paragraph (h)(6)(xi); and
- b. Adding paragraph (h)(27).

The additions read as follows:

#### **§ 214.2 Special requirements for admission, extension, and maintenance of status.**

\* \* \* \* \*

(h) \* \* \*

(6) \* \* \*

(xi) *Special requirements for additional cap allocations under Public Laws 116-260, 117-43 and 117-70--(A) Public Law 116-260, and sections 101 and 106(3) of Division A of Public Law 117-43, Continuing Appropriations Act, 2022, and section 101 of Division A of Public Law 117-70, Further Continuing Appropriations Act, 2022 through February 18, 2022--*  
*(I) Supplemental allocation for returning workers.* Notwithstanding the numerical limitations set forth in paragraph (h)(8)(i)(C) of this section, for fiscal year 2022 only, the Secretary has authorized up to an additional 13,500 visas for aliens who may receive H-2B nonimmigrant visas pursuant to section 105 of Division O of the Consolidated Appropriations Act, 2021, Public Law 116-260, sections 101 and 106(3) of Division A of Public Law 117-43, Continuing Appropriations Act, 2022, and section 101 of Division A of Public Law 117-70, Further Continuing Appropriations Act, 2022 through February 18, 2022 based on petitions requesting FY 2022 employment start dates on or before March 31, 2022. An alien may be eligible to receive an H-2B nonimmigrant visa under this paragraph (h)(6)(xi)(A)(I) if she or he is a returning worker. The term “returning worker” under this paragraph (h)(6)(xi)(A)(I) means a person who was issued an H-2B visa or was otherwise granted H-2B status in fiscal year 2019, 2020, or 2021. Notwithstanding § 248.2 of this chapter, an alien may not change status to H-2B nonimmigrant under this paragraph (h)(6)(xi)(A)(I).

(2) *Supplemental allocation for nationals of Guatemala, El Salvador, Honduras (Northern Triangle countries), or Haiti.* Notwithstanding the numerical limitations set forth in paragraph (h)(8)(i)(C) of this section, for fiscal year 2022 only, and in addition to the allocation described in paragraph (h)(6)(xi)(A)(I) of this section, the Secretary has authorized up to an additional 6,500 aliens who are nationals of Guatemala, El Salvador, Honduras (Northern Triangle countries), or of Haiti who may receive H-2B nonimmigrant visas pursuant to section 105 of Division O of the Consolidated Appropriations Act, 2021, Public Law 116-260, and

Public Laws 117-43 and 117-70, based on petitions with FY 2022 employment start dates on or before March 31, 2022. Such workers are not subject to the returning worker requirement in paragraph (h)(6)(xi)(A)(I). Petitioners must request such workers in an H-2B petition that is separate from H-2B petitions that request returning workers under paragraph (h)(6)(xi)(A)(I) and must declare that they are requesting these workers in the attestation required under 20 CFR 655.69(a)(1). A petition requesting returning workers under paragraph (h)(6)(xi)(A)(I), which is accompanied by an attestation indicating that the petitioner is requesting nationals of Northern Triangle countries or Haiti, will be rejected, denied or, in the case of a non-frivolous petition, will be approved solely for the number of beneficiaries that are from the Northern Triangle or Haiti. Notwithstanding § 248.2 of this chapter, an alien may not change status to H-2B nonimmigrant under this paragraph (h)(6)(xi)(A)(2).

(B) *Eligibility.* In order to file a petition with USCIS under this paragraph (h)(6)(xi), the petitioner must:

(I) Comply with all other statutory and regulatory requirements for H-2B classification, including, but not limited to, requirements in this section, under part 103 of this chapter, and under 20 CFR part 655 and 29 CFR part 503; and

(2) Submit to USCIS, at the time the employer files its petition, a U.S. Department of Labor attestation, in compliance with this section and 20 CFR 655.64, evidencing that:

(i) Its business is suffering irreparable harm or will suffer impending irreparable harm (that is, permanent and severe financial loss) without the ability to employ all of the H-2B workers requested on the petition filed pursuant to this paragraph (h)(6)(xi);

(ii) All workers requested and/or instructed to apply for a visa have been issued an H-2B visa or otherwise granted H-2B status in fiscal year 2019, 2020, or 2021, unless the H-2B worker is a national of Guatemala, El Salvador, Honduras, or Haiti who is counted towards the 6,500 cap described in paragraph (h)(6)(xi)(A)(2) of this section;

(iii) The employer will comply with all Federal, State, and local employment-related laws and regulations, including, where applicable, health and safety laws and laws related to COVID-19 worker protections; any right to time off or paid time off for COVID-19 vaccination, or to reimbursement for travel to and from the nearest available vaccination site; and that the employer will notify any H-2B workers approved under the supplemental cap in paragraph (h)(6)(xi)(A)(2) of this section, in a language understood by the worker as necessary or reasonable, that all persons in the United States, including nonimmigrants, have equal access to COVID-19 vaccines and vaccine distribution sites;

(iv) The employer will comply with obligations and additional recruitment requirements outlined in 20 CFR 655.64(a)(3) through (5);

(v) The employer will provide documentary evidence of the facts in paragraphs (h)(6)(xi)(B)(2)(i) through (iv) of this section to DHS or DOL upon request; and

(vi) The employer will agree to fully cooperate with any compliance review, evaluation, verification, or inspection conducted by DHS, including an on-site inspection of the employer's facilities, interview of the employer's employees and any other individuals possessing pertinent information, and review of the employer's records related to the compliance with immigration laws and regulations, including but not limited to evidence pertaining to or supporting the eligibility criteria for the FY 2022 supplemental allocations outlined in paragraph (h)(6)(xi)(B) of this section, as a condition for the approval of the petition.

(vii) The employer must attest on Form ETA-9142-B-CAA-5 that it will fully cooperate with any audit, investigation, compliance review, evaluation, verification or inspection conducted by DOL, including an on-site inspection of the employer's facilities, interview of the employer's employees and any other individuals possessing pertinent information, and review of the employer's records related to the compliance with applicable laws and regulations, including but not limited to evidence pertaining to or supporting the eligibility criteria for the FY 2022 supplemental allocations outlined in 20 CFR 655.64(a) and 655.69(a), as a condition for the

approval of the H-2B petition. The employer must further attest on Form ETA-9142-B-CAA-5 that it will not impede, interfere, or refuse to cooperate with an employee of the Secretary of the U.S. Department of Labor who is exercising or attempting to exercise DOL's audit or investigative authority pursuant to 20 CFR part 655, subpart A, and 29 CFR 503.25.

(C) *Processing.* USCIS will reject petitions filed pursuant to paragraph (h)(6)(xi)(A)(1) or (2) of this section that are received after the applicable numerical limitation has been reached or after March 31, 2022, whichever is sooner. USCIS will not approve a petition filed pursuant to this paragraph (h)(6)(xi) on or after October 1, 2022.

(D) *Numerical limitations under paragraphs (h)(6)(xi)(A)(1) and (2) of this section.* When calculating the numerical limitations under paragraphs (h)(6)(xi)(A)(1) and (2) of this section as authorized under Public Law 116-260, as extended by Public Law 117-43, and Public Law 117-70, USCIS will make numbers for each allocation available to petitions in the order in which the petitions subject to the respective limitation are received. USCIS will make projections of the number of petitions necessary to achieve the numerical limit of approvals, taking into account historical data related to approvals, denials, revocations, and other relevant factors. USCIS will monitor the number of petitions received (including the number of workers requested when necessary) and will notify the public of the dates that USCIS has received the necessary number of petitions (the "final receipt dates") under paragraph (h)(6)(xi)(A)(1) or (2). The day the public is notified will not control the final receipt dates. When necessary to ensure the fair and orderly allocation of numbers subject to the numerical limitations in paragraphs (h)(6)(xi)(A)(1) and (2), USCIS may randomly select from among the petitions received on the final receipt dates the remaining number of petitions deemed necessary to generate the numerical limit of approvals. This random selection will be made via computer-generated selection. Petitions subject to a numerical limitation not randomly selected or that were received after the final receipt dates that may be applicable under paragraph (h)(6)(xi)(A)(1) or (2) will be rejected. If the final receipt date is any of the first 5 business days on which petitions subject to the

applicable numerical limits described in paragraph (h)(6)(xi)(A)(1) or (2) may be received (in other words, if either of the numerical limits described in paragraph (h)(6)(xi)(A)(1) or (2) is reached on any one of the first 5 business days that filings can be made), USCIS will randomly apply all of the numbers among the petitions received on any of those 5 business days.

(E) *Sunset.* This paragraph (h)(6)(xi) expires on October 1, 2022.

(F) *Non-severability.* The requirement to file an attestation under paragraph (h)(6)(xi)(B)(2) of this section is intended to be non-severable from the remainder of this paragraph (h)(6)(xi), including, but not limited to, the numerical allocation provisions at paragraphs (h)(6)(xi)(A)(1) and (2) of this section in their entirety. In the event that any part of this paragraph (h)(6)(xi) is enjoined or held to be invalid by any court of competent jurisdiction, the remainder of this paragraph (h)(6)(xi) is also intended to be enjoined or held to be invalid in such jurisdiction, without prejudice to workers already present in the United States under this paragraph (h)(6)(xi), as consistent with law.

\* \* \* \* \*

(27) *Change of employers and portability for H-2B workers.* (i) This paragraph (h)(27) relates to H-2B workers seeking to change employers during the time period specified in paragraph (h)(27)(iv) of this section. Notwithstanding paragraph (h)(2)(i)(D) of this section:

(A) An alien in valid H-2B nonimmigrant status whose new petitioner files a non-frivolous H-2B petition requesting an extension of the alien's stay on or after [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], is authorized to begin employment with the new petitioner after the petition described in this paragraph (h)(27) is received by USCIS and before the new H-2B petition is approved, but no earlier than the start date indicated in the new H-2B petition; or

(B) An alien whose new petitioner filed a non-frivolous H-2B petition requesting an extension of the alien's stay before [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] that remains pending on [INSERT DATE OF PUBLICATION IN THE FEDERAL

REGISTER], is authorized to begin employment with the new petitioner before the new H-2B petition is approved, but no earlier than the start date of employment indicated on the new H-2B petition.

(ii)(A) With respect to a new petition described in paragraph (h)(27)(i)(A) of this section, and subject to the requirements of 8 CFR 274a.12(b)(30), the new period of employment described in paragraph (h)(27)(i) of this section may last for up to 60 days beginning on the Received Date on Form I-797 (Notice of Action) or, if the start date of employment occurs after the I-797 Received Date, for a period of up to 60 days beginning on the start date of employment indicated in the H-2B petition.

(B) With respect to a new petition described in paragraph (h)(27)(i)(B) of this section, the new period of employment described in paragraph (h)(27)(i) of this section may last for up to 60 days beginning on the later of either [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] or the start date of employment indicated in the H-2B petition.

(C) With respect to either type of new petition, if USCIS adjudicates the new petition before the expiration of this 60-day period and denies the petition, or if the new petition is withdrawn by the petitioner before the expiration of the 60-day period, the employment authorization associated with the filing of that petition under 8 CFR 274a.12(b)(30) will automatically terminate 15 days after the date of the denial decision or 15 days after the date on which the new petition is withdrawn. Nothing in this paragraph (h)(27) is intended to alter the availability of employment authorization related to professional H-2B athletes who are traded between organizations pursuant to paragraph (h)(6)(vii) of this section and 8 CFR 274a.12(b)(9).

(iii) In addition to meeting all other requirements in paragraph (h)(6) of this section for the H-2B classification, to commence employment and be approved under this paragraph (h)(27), the alien must either:

(A) Have been in valid H-2B nonimmigrant status on or after [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] and be the beneficiary of a non-frivolous H-

2B petition requesting an extension of the alien’s stay that is received on or after [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], but no later than [INSERT DATE 180 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]; or

(B) Be the beneficiary of a non-frivolous H-2B petition requesting an extension of the alien’s stay that is pending as of [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

(C) The petitioner must comply with all Federal, State, and local employment-related laws and regulations, including, where applicable, health and safety laws, laws related to COVID-19 worker protections, any right to time off or paid time off for COVID-19 vaccination, or to reimbursement for travel to and from the nearest available vaccination site; and

(D) The petitioner may not impede, interfere, or refuse to cooperate with an employee of the Secretary of the U.S. Department of Labor who is exercising or attempting to exercise DOL’s audit or investigative authority under 20 CFR part 655, subpart A, and 29 CFR 503.25.

(iv) Authorization to initiate employment changes pursuant to this paragraph (h)(27) begins at 12 a.m. on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], and ends at the end of [INSERT DATE 180 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

\* \* \* \* \*

## **PART 274a – CONTROL OF EMPLOYMENT OF ALIENS**

3. The authority citation for part 274a continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1105a, 1324a; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 101-410, 104 Stat. 890, as amended by Pub. L. 114-74, 129 Stat. 599.

4. Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] through January 28, 2025, amend § 274a.12 by adding paragraph (b)(31) to read as follows:



**§274a.12 Classes of aliens authorized to accept employment.**

\* \* \* \* \*

(b) \* \* \*

(31)(i) Pursuant to 8 CFR 214.2(h)(27) and notwithstanding 8 CFR 214.2(h)(2)(i)(D), an alien is authorized to be employed no earlier than the start date of employment indicated in the H-2B petition and no earlier than [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], by a new employer that has filed an H-2B petition naming the alien as a beneficiary and requesting an extension of stay for the alien, for a period not to exceed 60 days beginning on:

(A) The later of the “Received Date” on Form I-797 (Notice of Action) acknowledging receipt of the petition, or the start date of employment indicated on the new H-2B petition, for petitions filed on or after [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]; or

(B) The later of [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] or the start date of employment indicated on the new H-2B petition, for petitions that are pending as of [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

(ii) If USCIS adjudicates the new petition prior to the expiration of the 60-day period in paragraph (b)(31)(i) of this section and denies the new petition for extension of stay, or if the petitioner withdraws the new petition before the expiration of the 60-day period, the employment authorization under this paragraph (b)(31) will automatically terminate upon 15 days after the date of the denial decision or the date on which the new petition is withdrawn. Nothing in this section is intended to alter the availability of employment authorization related to professional H-2B athletes who are traded between organizations pursuant to paragraph (b)(9) of this section and 8 CFR 214.2(h)(6)(vii).

(iii) Authorization to initiate employment changes pursuant to 8 CFR 214.2(h)(27) and paragraph (b)(31)(i) of this section begins at 12 a.m. on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], and ends at the end of [INSERT DATE 180 DAYS AFTER DATE OF THE PUBLICATION IN THE FEDERAL REGISTER].

\* \* \* \* \*

## **DEPARTMENT OF LABOR**

### **Employment and Training Administration**

#### **20 CFR Chapter V**

Accordingly, for the reasons stated in the joint preamble, 20 CFR part 655 is amended as follows:

#### **PART 655--TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES**

5. The authority citation for part 655 continues to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 8 U.S.C. 1103(a)(6), 1182(m), (n), and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101-238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101-649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102-232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103-206, 107 Stat. 2428; sec. 412(e), Pub. L. 105-277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106-95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); 29 U.S.C. 49k; Pub. L. 107-296, 116 Stat. 2135, as amended; Pub. L. 109-423, 120 Stat. 2900; 8 CFR 214.2(h)(4)(i); 8 CFR 214.2(h)(6)(iii); and sec. 6, Pub. L. 115-218, 132 Stat. 1547 (48 U.S.C. 1806).

Subpart A issued under 8 CFR 214.2(h).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; and 8 CFR 214.2(h).

Subpart E issued under 48 U.S.C. 1806.

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); sec. 323(c), Pub. L. 103-206, 107 Stat. 2428; and 28 U.S.C. 2461 note, Pub. L. 114-74 at section 701.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b)(1), 1182(n), and (t), and 1184(g) and (j); sec. 303(a)(8), Pub. L. 102-232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 412(e), Pub. L. 105-277, 112 Stat. 2681; 8 CFR 214.2(h); and 28 U.S.C. 2461 note, Pub. L. 114-74 at section 701.

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m); sec. 2(d), Pub. L. 106-95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109-423, 120 Stat. 2900; and 8 CFR 214.2(h).

6. Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] through September 30, 2022, add § 655.64 to read as follows:

**§ 655.64 Special application filing and eligibility provisions for Fiscal Year 2022 under the [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] supplemental cap increase.**

(a) An employer filing a petition with USCIS under 8 CFR 214.2(h)(6)(xi) to request H-2B workers with FY 2022 employment start dates on or before March 31, 2022, must meet the following requirements:

(1) The employer must attest on the Form ETA-9142-B-CAA-5 that its business is suffering irreparable harm or will suffer impending irreparable harm (that is, permanent and severe financial loss) without the ability to employ all of the H-2B workers requested on the petition filed pursuant to 8 CFR 214.2(h)(6)(xi). Additionally, the employer must attest that it will provide documentary evidence of the applicable irreparable harm to DHS or DOL upon request.

(2) The employer must attest on Form ETA-9142-B-CAA-5 that each of the workers requested and/or instructed to apply for a visa, whether named or unnamed, on a petition filed pursuant to 8 CFR 214.2(h)(6)(xi), have been issued an H-2B visa or otherwise granted H-2B

status during one of the last three (3) fiscal years (fiscal year 2019, 2020, or 2021), unless the H-2B worker is a national of Guatemala, El Salvador, Honduras, or Haiti and is counted towards the 6,500 cap described in 8 CFR 214.2(h)(6)(xi)(A)(2).

(3) The employer must attest on Form ETA-9142-B-CAA-5 that the employer will comply with all the assurances, obligations, and conditions of employment set forth on its approved *Application for Temporary Employment Certification*.

(4) The employer must attest on Form ETA-9142-B-CAA-5 that it will comply with all Federal, State, and local employment-related laws and regulations, including, where applicable, health and safety laws and laws related to COVID-19 worker protections; any right to time off or paid time off for COVID-19 vaccination, or to reimbursement for travel to and from the nearest available vaccination site; and that the employer will notify any H-2B workers approved under the supplemental cap in 8 CFR 214.2(h)(6)(xi)(A)(1) and (2), in a language understood by the worker as necessary or reasonable, that all persons in the United States, including nonimmigrants, have equal access to COVID-19 vaccines and vaccine distribution sites.

(5) An employer that submits Form ETA-9142B-CAA-5 and the I-129 petition 45 or more days after the certified start date of work, as shown on its approved *Application for Temporary Employment*, must conduct additional recruitment of U.S. workers as follows:

(i) Not later than the next business day after submitting the I-129 petition for H-2B worker(s), the employer must place a new job order for the job opportunity with the State Workforce Agency (SWA), serving the area of intended employment. The employer must follow all applicable SWA instructions for posting job orders, inform the SWA that the job order is being placed in connection with a previously certified *Application for Temporary Employment Certification* for H-2B workers by providing the unique temporary labor certification (TLC) identification number, and receive applications in all forms allowed by the SWA, including online applications (sometimes known as “self-referrals”). The job order must contain the job

assurances and contents set forth in § 655.18 for recruitment of U.S. workers at the place of employment, and remain posted for at least 15 calendar days;

(ii) During the period of time the SWA is actively circulating the job order described in paragraph (a)(5)(i) of this section for intrastate clearance, the employer must contact, by email or other available electronic means, the nearest comprehensive American Job Center (AJC) serving the area of intended employment where work will commence, request staff assistance advertising and recruiting qualified U.S. workers for the job opportunity, and provide the unique identification number associated with the job order placed with the SWA or, if unavailable, a copy of the job order. If a comprehensive AJC is not available, the employer must contact the nearest affiliate AJC serving the area of intended employment where work will commence to satisfy the requirements of this paragraph (a)(5)(ii);

(iii) During the period of time the SWA is actively circulating the job order described in paragraph (a)(5)(i) of this section for intrastate clearance, the employer must contact (by mail or other effective means) its former U.S. workers, including those who have been furloughed or laid off, during the period beginning January 1, 2020, until the date the I-129 petition required under 8 CFR 214.2(h)(6)(xi) is submitted, who were employed by the employer in the occupation at the place of employment (except those who were dismissed for cause or who abandoned the worksite), disclose the terms of the job order, and solicit their return to the job. The contact and disclosures required by this paragraph (a)(5)(iii) must be provided in a language understood by the worker, as necessary or reasonable;

(iv) During the period of time the SWA is actively circulating the job order described in paragraph (a)(5)(i) of this section for intrastate clearance, the employer must engage in the recruitment of U.S. workers as provided in § 655.45(a) and (b). The contact and disclosures required by this paragraph (a)(5)(iv) must be provided in a language understood by the worker, as necessary or reasonable; and

(v) The employer must hire any qualified U.S. worker who applies or is referred for the job opportunity until the date on which the last H-2B worker departs for the place of employment, or 30 days after the last date on which the SWA job order is posted, whichever is later. Consistent with § 655.40(a), applicants can be rejected only for lawful job-related reasons.

(6) The employer must attest on Form ETA-9142-B-CAA-5 that it will fully cooperate with any audit, investigation, compliance review, evaluation, verification, or inspection conducted by DOL, including an on-site inspection of the employer's facilities, interview of the employer's employees and any other individuals possessing pertinent information, and review of the employer's records related to the compliance with applicable laws and regulations, including but not limited to evidence pertaining to or supporting the eligibility criteria for the FY 2022 supplemental allocations outlined in this paragraph (a) and §655.69(a), as a condition for the approval of the H-2B petition. Pursuant to this subpart and 29 CFR 503.25, the employer will not impede, interfere, or refuse to cooperate with an employee of the Secretary who is exercising or attempting to exercise DOL's audit or investigative authority.

(b) This section expires on October 1, 2022.

(c) The requirements under paragraph (a) of this section are intended to be non-severable from the remainder of this section; in the event that paragraph (a)(1), (2), (3), (4), or (5) of this section is enjoined or held to be invalid by any court of competent jurisdiction, the remainder of this section is also intended to be enjoined or held to be invalid in such jurisdiction, without prejudice to workers already present in the United States under this part, as consistent with law.

7. Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] through September 30, 2025, add § 655.69 to read as follows:

**§ 655.69 Special document retention provisions for Fiscal Years 2022 through 2026 under Public Laws 116-260, 117-43, and 117-70.**

(a) An employer that files a petition with USCIS to employ H-2B workers in fiscal year 2022 under authority for the temporary increase in the numerical limitation provided by Pub. L.

117-43 and Pub. L. 117-70 on the same terms as section 105 of Division O, of Public Law 116-260, must maintain for a period of three (3) years from the date of certification, consistent with 20 CFR 655.56 and 29 CFR 503.17, the following:

(1) A copy of the attestation filed pursuant to the regulations in 8 CFR 214.2 governing that temporary increase;

(2) Evidence establishing, at the time of filing the I-129 petition, that the employer's business is suffering irreparable harm or will suffer impending irreparable harm (that is, permanent and severe financial loss) without the ability to employ all of the H-2B workers requested on the petition filed pursuant to 8 CFR 214.2(h)(6)(xi);

(3) Documentary evidence establishing that each of the workers the employer requested and/or instructed to apply for a visa, whether named or unnamed on a petition filed pursuant to 8 CFR 214.2(h)(6)(xi), have been issued an H-2B visa or otherwise granted H-2B status during one of the last three (3) fiscal years (fiscal year 2019, 2020, or 2021), unless the H-2B worker(s) is a national of El Salvador, Guatemala, Honduras, or Haiti and is counted towards the 6,500 cap described in 8 CFR 214.2(h)(6)(xi)(A)(2). Alternatively, if applicable, employers must maintain documentary evidence that the workers the employer requested and/or instructed to apply for visas are eligible nationals of El Salvador, Guatemala, Honduras, or Haiti as defined in 8 CFR 214.2(h)(6)(xi)(A)(2); and

(4) If applicable, proof of recruitment efforts set forth in § 655.64(a)(5)(i) through (iv) and a recruitment report that meets the requirements set forth in § 655.48(a)(1) through (4) and (7), and maintained throughout the recruitment period set forth in § 655.64(a)(5)(v).

(b) DOL or DHS may inspect the documents in paragraphs (a)(1) through (4) of this section upon request.

(c) This section expires on October 1, 2025.

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Alejandro N. Mayorkas,  
*Secretary,*  
*U.S. Department of Homeland Security.*

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Martin J. Walsh,  
*Secretary,*  
*U.S. Department of Labor.*

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